DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1016
Title: Daniel Coleman, Petitioner
v.
Court of Appeals of Maryland, et al.
Docketed: February 10, 2011
Linked with 11A578
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (09-1582)
Decision Date: November 10, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 8 2011	Petition for a writ of certiorari filed. (Response due March 14, 2011)
Feb 24 2011	Waiver of right of respondents Court of Appeals of Maryland, et al. to respond filed.
Mar 9 2011	DISTRIBUTED for Conference of March 25, 2011.
Mar 23 2011	Response Requested . (Due April 22, 2011)
Apr 8 2011	Order extending time to file response to petition to and including May 13, 2011.
May 11 2011	Order further extending time to file response to petition to and including May 27, 2011.
May 25 2011	Order further extending time to file response to petition to and including May 31, 2011.
May 31 2011	Brief of respondents Court of Appeals of Maryland, et al. in opposition filed.
Jun 3 2011	Reply of petitioner Daniel Coleman filed.
Jun 7 2011	DISTRIBUTED for Conference of June 23, 2011.
Jun 27 2011	Petition GRANTED.
Jul 8 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 20, 2011.
Aug 12 2011	Blanket consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner and counsel for the respondents.
Sep 20 2011	Joint appendix filed. (Statement of costs filed)
Sep 20 2011	Brief of petitioner Daniel Coleman filed.
Sep 27 2011	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
Sep 27 2011	Brief amicus curiae of Constitutional Accountability Center filed.
Sep 27 2011	Brief amici curiae of National Partnership for Women & Families, et al. filed.
Sep 27 2011	Brief amici curiae of Senator Tom Harkin, et al. filed.
Oct 17 2011	The time to file respondents' brief on the merits is extended to and including November 21, 2011.
Nov 14 2011	SET FOR ARGUMENT ON Wednesday, January 11, 2012.

Nov 15 2011	CIRCULATED.
Nov 18 2011	The time to file respondents' brief on the merits is further extended to and including November 25, 2011.
Nov 25 2011	The time to file respondents' brief on the merits is further extended to and including November 28, 2011. The Clerk will entertain no further requests for extensions of time from counsel for the respondents.
Nov 28 2011	Brief of respondents Court of Appeals of Maryland, et al. filed. (Distributed)
Dec 5 2011	Motion of Senator Tom Harkin, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Dec 5 2011	Brief amici curiae of Texas, et al. filed. (Distributed)
Dec 7 2011	Response to motion of Senator Harkin, et al. for divided argument from counsel for respondents'
Dec 12 2011	Motion of Senator Tom Harkin, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Dec 14 2011	Application (11A578) to extend the time to file a reply brief on the merits from December 28, 2011 to December 30, 2011, submitted to The Chief Justice.
Dec 16 2011	Application (11A578) granted by The Chief Justice extending the time to file until December 29, 2011. The brief is to be filed with the Clerk and served upon opposing counsel by 2 p.m.
Dec 28 2011	Reply of petitioner Daniel Coleman filed. (Distributed)
Jan 11 2012	Argued. For petitioner: Michael L. Foreman, University Park, Pa. For respondents: John B. Howard, Jr., Deputy Attorney General, Baltimore, Md.
Mar 20 2012	Adjudged to be AFFIRMED. Kennedy, J., announced the judgment of the Court and delivered an opinion, in which Roberts, C. J., and Thomas and Alito, JJ., joined. Thomas, J., filed a concurring opinion. Scalia, J., filed an opinion concurring in the judgment. Ginsburg, J., filed a dissenting opinion, in which Breyer, J., joined, and in which Sotomayor and Kagan, JJ., joined as to all but footnote 1.
Apr 23 2012	JUDGMENT ISSUED.
May 2 2012	Record returned to U.S.D.C. for District of Maryland.
May 2 2012	Record returned to U.S.C.A. for 4th Circuit.

PETITION FOR WRIT OF CERTIORARI

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No. 10-1016

In The

Supreme Court of the United States

DANIEL COLEMAN,

Petitioner,

v.

MARYLAND COURT OF APPEALS; FRANK BROCCOLINA, STATE COURT ADMINISTRATOR; LARRY JONES, CONTRACT ADMINISTRATOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 8, 2011

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QUESTION PRESENTED FOR REVIEW

In passing the Family and Medical Leave Act, as the Court recognized in *Nevada Department of Human Resources v. Hibbs*, Congress intended to eliminate gender discrimination in the granting of sick leave. Its purpose and findings are supported by the legislative record. The question presented for review is:

Whether Congress constitutionally abrogated states' Eleventh Amendment immunity when it passed the self-care leave provision of the Family and Medical Leave Act.

PARTIES TO THE PROCEEDING

All parties to this action are set forth in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Daniel Coleman, respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, entered in this case on November 10, 2010.

OPINIONS BELOW

The November 10, 2010, opinion of the United States Court of Appeals for the Fourth Circuit is published at *Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010); App. 1-14. The May 7, 2009, order granting Maryland Court of Appeals' Motion to Dismiss Plaintiff's Amended Complaint is unpublished. App. 15-20.

STATEMENT OF JURISDICTION

The Fourth Circuit Court of Appeals entered its final judgment on November 10, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment provides, in pertinent part:

> Section 1. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.* provides employees up to twelve weeks of unpaid leave for medical reasons or other qualifying exigencies. 29 U.S.C. § 2612(a)(1). The pertinent provisions provide:

> (1) Entitlement to leave
>
> Subject to section 103 [29 U.S.C. § 2613] of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

STATEMENT UNDER SUP. CT. R. 29.4(b)

Because this proceeding draws into question the constitutionality of the self-care provision of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a)(1)(D), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

The record in this case does not reflect that either the United States District Court for the District of Maryland or the United States Court of Appeals for the Fourth Circuit certified to the Attorney General the fact that the constitutionality of such an Act of Congress has been drawn into question.

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Solicitor General's office filed a Brief in Opposition stating that it was "lodging with the Court copies of letters from the Solicitor General notifying Congress of his decision to decline further defense of the abrogation of Eleventh Amendment immunity for claims brought under 29 U.S.C. 2612(a)(1)(D)." Brief for the United States in Opposition, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368), 2002 WL 32135355, at *8 n.2. The letters attached to this lodging explained that this would continue to be the Solicitor General's position "absent changed circumstances." This issue is discussed in more detail at pages 24 to 27 of the Petition.

STATEMENT OF THE CASE

I. Overview

The United States Court of Appeals for the Fourth Circuit held that the self-care provision of the Family and Medical Leave Act (FMLA) does not validly abrogate Eleventh Amendment immunity. This decision directly contradicts Congress' expressed

purpose. In the FMLA, Congress intended to act in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment to "minimize[] the potential for employment discrimination on the basis of sex by ensuring that leave is available for eligible health reasons (including maternity-related disability) . . . on a gender-neutral basis; and to promote the goal of equal opportunity for women and men." 29 U.S.C. § 2601(b)(4)-(5).

II. Mr. Coleman's Termination

Daniel Coleman was an employee of the Maryland Court of Appeals for six years. He served as the executive director of procurement and contract administration for four of the six years. App. 2. Mr. Coleman satisfied all performance standards and received every incremental raise to which he was entitled during his time at the court. App. 3. Mr. Coleman received no reprimands or negative reviews in his six years of employment, except for an unexplained letter of reprimand discussed in more detail below, which he received for performing his assigned duties. *Id.*

In October 2005, as part of his job duties, Mr. Coleman initiated an investigation of two employees under his supervision. One of these employees, Larry Jones, was related to one of Mr. Coleman's supervisors, Faye Gaskins. App. 2-3. Mr. Coleman found evidence of misconduct on Mr. Jones' part, resulting in a five-day suspension of Mr. Jones. App. 3. Ms.

Gaskins and Frank Broccolina, another one of Mr. Coleman's supervisors, intervened in the investigation and reduced Mr. Jones' suspension to only one day. *Id.* "In retaliation for Coleman's investigation, Jones falsely alleged that Coleman had steered contracts to vendors in which Coleman had an interest." *Id.* Mr. Broccolina investigated the accusations against Mr. Coleman. App. 3. Despite finding no evidence of wrongdoing, Mr. Broccolina perpetuated the accusations against Mr. Coleman with knowledge that they were false. *Id.*

Following the suspension of Mr. Jones and despite the fact that Mr. Broccolina could find no wrongdoing by Mr. Coleman, Ms. Gaskins then issued Mr. Coleman a reprimand. *Id.* In April 2007, Mr. Coleman unsuccessfully appealed the reprimand. *Id.* In August 2007, Mr. Coleman sent a letter to Mr. Broccolina requesting sick-leave for a documented medical condition. *Id.* This request was not only denied, but Mr. Broccolina replied with an ultimatum for Mr. Coleman: resign or be terminated. *Id.* Mr. Coleman was then fired. *Id.*

III. Proceedings Below

After exhausting his administrative remedies, Mr. Coleman filed suit against the Maryland Court of Appeals, Mr. Broccolina, and Mr. Jones. App. 3. Mr. Coleman alleged race discrimination in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)), unlawful retaliation in violation of 42

U.S.C. § 2000e-3(a), and a violation of the FMLA's self-care provision, 29 U.S.C. § 2612(a)(1)(D). App. 4. The District Court granted the defendants' Rule 12(b)(6) motion to dismiss as to the Title VII claims for failure to state a claim upon which relief can be granted. The District Court also dismissed Mr. Coleman's FMLA claim, holding that the FMLA's self-care provisions did not validly abrogate Eleventh Amendment immunity. App. 17.

The Fourth Circuit affirmed the District Court on all counts. App. 14. The court affirmed the Title VII dismissals because, in the Fourth Circuit's opinion, Mr. Coleman's complaint did not sufficiently allege race discrimination, or any protected Title VII activity for purposes of retaliation. App. 6-7.

In addressing the Eleventh Amendment immunity issue, the Fourth Circuit affirmed the dismissal of Mr. Coleman's claim, finding that Congress failed to validly abrogate Eleventh Amendment immunity for the FMLA's self-care provision. The Fourth Circuit noted that in a prior case it had held that "Congress exceeded its authority in applying the FMLA to the States." App. 11. In light of *Hibbs*, the court in *Coleman* went on to recognize that its prior "analysis [was] no longer valid." App. 12. Despite this acknowledgment, the Fourth Circuit again determined that the self-care provision of the FMLA was not a valid exercise of Congress' power under section 5 of the Fourteenth Amendment. The Fourth Circuit primarily relied on cases from other circuits. These

decisions had characterized the issue as "close" or presenting a "colorable" claim for abrogation of the States' Eleventh Amendment immunity. App. 13.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS FOLLOWING *HIBBS* DEMONSTRATE THAT THE ISSUE OF WHETHER THE SELF-CARE PROVISION IS A VALID ABROGATION OF ELEVENTH AMENDMENT IMMUNITY IS ONE THIS COURT SHOULD RESOLVE.

A. Introduction.

Congress enacted the FMLA, at least in part, to combat gender-related discrimination in the workplace. 29 U.S.C. § 2601(b); *Hibbs,* 538 U.S. at 728. The FMLA enables employees to take twelve weeks of unpaid leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). In *Hibbs,* the Court held that Congress validly abrogated Eleventh Amendment immunity with regard to the FMLA's family-care provision (29 U.S.C. § 2612(a)(1)(C)). The Court reasoned that the purpose of the FMLA is to prevent gender-based discrimination in the workplace, and the family-care provision is both "congruent and proportional" to this end. *Hibbs*, 538 U.S. at 728. The *Hibbs* Court found that Congress effectively utilized its powers under the Fourteenth Amendment to abrogate Eleventh

Amendment immunity. *Id.* at 735. *Hibbs*, however, did not directly address whether the self-care provision was a valid abrogation of the states' Eleventh Amendment immunity.

Since *Hibbs*, six circuits have held that Congress exceeded its authority under the Fourteenth Amendment when it passed the self-care provision of the FMLA.[1] This appearance of unanimity, however, masks the closeness and importance of the issue.[2] The Court has repeatedly demonstrated that the decision to grant certiorari is not merely a mathematic exercise of counting the number of circuits on one side of

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[1] *Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010); *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318 (5th Cir. 2008); *Touvell v. Ohio Dep't of Mental Retardation & Dev. Disabilities*, 422 F.3d 392 (6th Cir. 2005); *Toeller v. Wisc. Dep't of Corr.*, 461 F.3d 871 (7th Cir. 2006); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007); *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003). Additionally, three state courts have found no valid abrogation of sovereign immunity. *See, e.g.*, *UTEP v. Herrera*, 322 S.W.3d 192 (Tex. 2010); *Nicholas v. Att'y Gen.*, 168 P.3d 809 (Utah 2007); *Lizzi v. Wash. Metro. Area Transit Auth.*, 862 A.2d 1017 (Md. 2004).

[2] *See Montgomery v. Maryland*, 72 F. App'x. 17, 19 (4th Cir. 2003) (per curiam) (reasoning that sovereign immunity is waived in FMLA actions); *McKlintic v. 36th Judicial Circuit Court*, 508 F.3d 875, 878 (8th Cir. 2007) (Bright J., concurring) (reasoning that an argument can be made that the self-care provision validly waives sovereign immunity). *Lee v. State*, 765 N.W.2d 607 (table decision), *appeal docketed*, No. 07-1879 (Iowa Ct. App. 2009) (holding that the self-care provision was a valid abrogation of sovereign immunity).

an issue.[3] In *Hibbs*, the Court granted certiorari despite the fact that seven circuits had already held the FMLA was not enacted pursuant to a valid exercise of Congress' power. One of the specified considerations of whether a grant of certiorari is appropriate is where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). This is especially true when a court of appeals has invalidated an act of Congress, as the Fourth Circuit has done here.[4] This case presents a fundamental issue of constitutional law that warrants this Court's resolution.

B. Some of the leading cases post-*Hibbs* recognize that the issue presents a "close question" or that there is a "colorable claim" of valid abrogation.

In *Brockman v. Wyoming Department of Family Services*, the first post-*Hibbs* case to address the self-care issue, the Tenth Circuit held that *Hibbs* did not extend to the FMLA's self-care provision and was

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[3] *See, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976) (certiorari granted "to resolve this important constitutional question").

[4] *See Adkins v. Children's Hosp.*, 261 U.S. 525, 544 (1923) (holding that the "judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy"); *United States v. Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the grave act of annulling an Act of Congress").

limited in its applicability to the family-care provision. 342 F.3d 1159, 1164. Despite this ruling, the court recognized that there is a "colorable argument to the effect that the self-care provision of the FMLA must be viewed as part of the Act as a whole, and that it would therefore be a valid abrogation of states' sovereign immunity." *Id.*

In *Tbeller v. Wisconsin Department of Corrections*, the Seventh Circuit relied on *Brockman* to find that *Hibbs* did not extend to the FMLA's self-care provision. 461 F.3d at 873. Like *Brockman*, however, *Tbeller* described the issue of whether Congress abrogated Eleventh Amendment immunity with respect to the self-care provision as a "close question." *Id.*

Others to address the issue have been more explicit. In *McKlintic v. 36th Judicial Circuit Court*, Judge Bright wrote separately "to observe that an argument can be made that the self-care provision of the FMLA permits a suit against the State. This issue therefore needs resolution by the United States Supreme Court." 508 F.3d at 878 (8th Cir. 2007) (Bright J., concurring). As discussed below, *Brockman* and *Tbeller* are the foundation upon which many of the other circuits' decisions are built. These foundational cases recognize that the question of whether the self-care provision is a valid abrogation of Eleventh Amendment immunity is an issue subject to differing interpretations. This Court should grant certiorari to definitively resolve the question.

C. Other circuits have relied upon *Brockman* and *Toeller* with limited analysis.

Following the Tenth Circuit's decision in *Brockman*, several other circuits found that Congress did not abrogate Eleventh Amendment immunity with respect to the self-care provision. However, their analysis was based in large part on *Brockman* and *Toeller*.

In *Touvell v. Ohio Department of Mental Retardation*, the Sixth Circuit relied heavily on the reasoning in *Brockman*. 422 F.3d at 399. The court stated, "we agree with the Tenth Circuit that the Supreme Court's holding in *Hibbs* does not apply to the self-care provision of the FMLA, and that private suits for damages may not be brought against states for alleged violations of the Act arising from claimed entitlement to leave under § 2612(a)(1)(D)." 422 F.3d at 400.

Similarly in *Toeller*, the Seventh Circuit relied on the reasoning of *Brockman* and *Touvell*, noting "[w]e are not the first to be asked to decide, in the light of *Hibbs*, whether the self-care provision of the FMLA is another valid abrogation of the State's sovereign immunity." 461 F.3d at 878. The Seventh Circuit ultimately held that "[w]hile we consider the question a close one . . . [we agree] with our sister circuits that [*Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001)] controls the self-care

provision, and thus that the State is entitled to immunity here."[6] *Id.* at 873.

In *Nelson v. University of Texas at Dallas*, the Fifth Circuit failed to provide any independent analysis of the issue. 535 F.3d 318, 321 (5th Cir. 2008). The court stated that since *Hibbs*, "the Sixth, Seventh, and Tenth Circuits have recognized that . . . states may still assert an Eleventh Amendment immunity defense to claims brought pursuant to subsection D." *Id.* After discussing *Brockman* and *Touvell*, the court simply held that "we agree with the rationale . . . that the Supreme Court's ruling in *Hibbs* only applies to subsection C." *Id.* This is the extent of the analysis employed by the Fifth Circuit.

In *Coleman*, the Fourth Circuit observed that "since *Hibbs* was decided, each of the four circuits to consider the issue has concluded Congress did not validly abrogate sovereign immunity as to the FMLA's self-care provision." App. 13-14. The Fourth Circuit did not provide any new or independent analysis. It simply decided to "join [the other] circuits" in holding that Congress did not abrogate Eleventh Amendment immunity with regard to the self-care provision. App. 14.

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[6] *See* note 10 and accompanying text in Section II, *infra*, which addresses the issue of why *Garrett* is not the controlling authority.

D. The other circuits, finding no valid abrogation, have simply relied on their pre-*Hibbs* cases.

Despite the Court's ruling in *Hibbs*, circuits continue to rely on pre-*Hibbs* rationale. A number of these courts have reasoned that their own pre-*Hibbs* case law was controlling because *Hibbs* was limited to the family-care provision. Without Supreme Court guidance, courts will continue to employ this potentially misplaced reliance.

No better example of this reliance can be found than in the Eighth Circuit. In *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000), the Eighth Circuit first struck down the entire FMLA as applied to the states on Eleventh Amendment grounds. In *Townsel*, the court had explained that "the FMLA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 1096 (internal quotations omitted). This decision was, at least in part, subsequently overruled by *Hibbs*.

The Eighth Circuit had its first opportunity to address the FMLA's self-care provision in light of the *Hibbs* decision in *Miles v. Bellfontaine Habilitation Center*, 481 F.3d 1106 (8th Cir. 2007) (per curiam). In *Miles*, the Eighth Circuit, in a four paragraph opinion, noted that its previous decision in *Townsel* was "overruled in part" by *Hibbs*. 481 F.3d at 1106. However, the Eighth Circuit then relied on this partially overruled pre-*Hibbs* analysis noting, "[t]he district court

properly dismissed with prejudice Miles's FMLA claim" because "[a]s an agency of the state of Missouri, the Center is entitled to Eleventh Amendment immunity." 481 F.3d at 1107 (citing *Townsel*, 233 F.3d at 1094). Although the court did mention that *Hibbs* overruled *Townsel* in part, it did not say which part was overruled, nor did it address the fact that *Townsel*'s holding on the validity of the entire FMLA was explicitly overruled in *Hibbs*. *Id.* In the one sentence of its opinion dedicated to this issue, the court accepted the *Brockman* decision that the self-care provision was not a valid abrogation of Eleventh Amendment immunity. *Id.*

When the *McKlintic* case came before the Eighth Circuit, the court stated that it was "bound by the earlier decision of a [different] panel of [that] court." 508 F.3d at 877 (citing *Miles*, 481 F.3d at 1107 (8th Cir. 2007) (per curiam)). Constrained by its earlier decision, the court was prevented from "reconsidering the question of whether the Eleventh Amendment bars a suit against a state for violation of the self-care provisions of the FMLA." *Id.* The fact that the court in *McKlintic* felt compelled to follow its own circuit precedent, which relied on pre-*Hibbs* analysis, no doubt explains Judge Bright's concurrence noting that the Supreme Court needs to resolve the issue. *See id.* at 878 (Bright J., concurring).

Similarly, in *Touvell,* the Sixth Circuit focused its analysis on its own pre-*Hibbs* precedent. Prior to *Hibbs*, the Sixth Circuit in *Sims v. University of Cincinnati*, had reasoned that Congress was "crafting

a piece of social legislation rather than a remedy for ongoing state violations of the Equal Protection Clause." 219 F.3d 559, 564 (6th Cir. 2000). The *Touvell* court relied upon pre-*Hibbs* analysis stating, "[w]e do not believe that *Hibbs* undermines the holdings of the First, Second, Fourth, Tenth, and Eleventh Circuits that the self-care provision of the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity."[6] 422 F.3d at 400.

Likewise, the Fifth Circuit in *Nelson* merely relied on its pre-*Hibbs* precedent. 535 F.3d 318. Prior to *Nelson*, the Fifth Circuit in *Kazmier v. Widmann*, had "declared that the Eleventh Amendment immunized states from suits for money damages brought under subsection C and D of § 2612(a)(1)." *Id.* at 321 (citing *Kazmier v. Widmann*, 225 F.3d 519, 526-29 (5th Cir. 2000)). The Fifth Circuit observed that, since *Hibbs*, three other circuits have found no valid abrogation of Eleventh Amendment immunity. Without further analysis, the court found that the "decision in *Kazmier* still remains the law of this circuit with respect to subsection D." *Id.*

Given the analysis employed by the circuits, it is doubtful that a more defined split will develop. Several circuits have indicated that this issue warrants further review. Others simply adopt the holdings used

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[6] Even *Coleman* acknowledged that its pre-*Hibbs* precedent was subsequently overruled and no longer good law. This is directly in conflict with the Sixth Circuit's findings in *Touvell*.

by fellow circuits, employing limited independent analysis. Still others feel constrained by their own pre-*Hibbs* resolutions of the issue. Without the guidance of this Court, this pattern may continue for years to come. This Court should grant review in order to definitively resolve this important constitutional issue.

II. THIS COURT SHOULD PROVIDE GUIDANCE AND CERTAINTY TO CONGRESS, THE COURTS, AND THE STATES REGARDING THE NATURE OF THE LEGISLATIVE RECORD REQUIRED TO VALIDLY ABROGATE ELEVENTH AMENDMENT IMMUNITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

The Court in *Hibbs* seemed to answer the question of what type of legislative record Congress must develop when legislating pursuant to its powers under section 5 of the Fourteenth Amendment to effect a valid abrogation of Eleventh Amendment immunity. The Court required that "Congress [have] evidence of a pattern of constitutional violations on the part of the states in [the relevant area]." *Hibbs*, 538 U.S. at 729. The Court considered the legislative record, particularly testimony and reports that indicated Congress' general intent to prevent gender-discrimination in the workplace. *Id.* Its examination of the legislative record led the Court to find that even after Congress enacted Title VII, "[s]tates continue[d] to rely on invalid gender stereotypes in the

employment context, specifically in the administration of leave benefits." *Id.* According to the Court, this was precisely the evidence Congress relied on in enacting the FMLA.

In light of this legislative record, the Court found that "[t]he persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation." *Id.* at 730. "Congress' chosen remedy, the family-care leave provision of the FMLA, is congruent and proportional to the targeted violation." *Id.* at 737 (internal quotations omitted). The Court did not offer an opinion as to whether this legislative history supports abrogation of the states' Eleventh Amendment immunity as to the entire FMLA. However, the Court seemed to have found sufficient evidence in the legislative record to support Congress' enactment of the FMLA as a comprehensive prophylactic legislative scheme that is congruent and proportional.

Following *Hibbs*, confusion has developed over exactly what type of legislative record Congress must develop to sufficiently abrogate Eleventh Amendment immunity, and whether there must be a sufficient record created for each individual subpart of the relevant provisions. Some courts have required a very specific record for all parts of the statute. These courts do not read the FMLA as a whole and seem to require a sufficient legislative record to support each subpart. Conversely, other courts, parties, and even the United States Government have reasoned that the FMLA as a whole was congruent and proportional

to what Congress identified as the potential for gender-based discrimination. This theory rests on the notion that the FMLA's subparts should be viewed as part of the FMLA's comprehensive scheme.

The ensuing confusion has resulted in Congress legislating without guidance, hoping that in the end, it will have provided an adequate record to accomplish a valid abrogation of Eleventh Amendment immunity. This issue is especially relevant where, as here, Congress promulgates legislation with provisions that have directly related subparts, which Congress included as integral parts of its comprehensive response to an important constitutional issue (i.e., states engaging in gender discrimination and stereotyping).

Some courts seem to read *Hibbs* to require a specific legislative record for each individual subpart. Because the question in *Hibbs* concerned the FMLA's family-care provision, these courts reason that the *Hibbs* Court's finding of congruence and proportionality is not relevant to whether the next clause of the same section, the self-care provision, is congruent and proportional. For example, in *Brockman*, the Tenth Circuit believed that the legislative history revealed that the self-care provision's purpose was to alleviate economic burdens on employees and to avoid discrimination against those with serious health problems. 342 F.3d at 1164. The *Brockman* court analyzed the FMLA's legislative history and applied it on a section-by-section basis.

Relying heavily on *Brockman* and *Laro*, the *Touvell* court agreed that *Hibbs* did not apply to the self-care provision. *Touvell*, 422 F.3d 392; *see Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001). The Sixth Circuit seemed to rely solely on the legislative record enunciated in *Hibbs*. It found that the legislative record did not "sufficiently tie[ ] the [self-care] provision to the prevention of gender-based discrimination." *Touvell*, 422 F.3d at 400 (quoting *Brockman*, 342 F.3d at 1164) (internal quotation marks omitted). The court viewed the Act's subparts separately and disagreed with the argument that the self-care provision "[was] a prophylactic measure necessary to effectuate the broader anti-discriminatory purpose of the FMLA as a whole." *Id.* at 403-05.

Additionally, in *Toeller*, the Seventh Circuit believed that the FMLA's subparts should be viewed separately and determined that it had to find "comparable justification in the statute for self-care to that which persuaded the [*Hibbs*] Court for family-care." 461 F.3d at 879. The *Toeller* court did not engage in an extensive analysis of the legislative record, but simply stated that "what counts is that we see nothing in either the text or the legislative history of the FMLA to indicate that Congress found" that women would be more likely than men to have the need for short-term medical needs unrelated to pregnancy. *Id.* at 879.

Conversely, other courts, parties and the United States Government[7] have recognized that if the legislative record supports abrogation generally, then it applies to the statute as a whole and does not require an explanation supporting each individual subpart.[8] In *Montgomery*, for example, the Fourth Circuit read *Hibbs* as an affirmation of Congress' complete abrogation of Eleventh Amendment immunity against actions brought under the FMLA. 72 F. App'x. at 19. Likewise, in *Lee v. State*, the Iowa Court of Appeals chose to read the legislative history as generally

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[7] *See* discussion of the United States' position in *Bylsma v. Freeman*, 346 F.3d 1324 (11th Cir. 2003), Section III, *infra*.

[8] We recognize that some courts have reasoned that *Garrett* controls the issue of whether the FMLA's individual subsections should be parsed. *Garrett*, however, is distinguishable because the court was wrestling with Title I and Title II of the Americans with Disabilities Act. Whereas the FMLA's leave provisions are subparts of the same statutory provision, Title I and Title II are separate and distinct provisions of the ADA. Specifically, Title I applies to states and private entities as employers and was designed to prevent discrimination in employment regarding disabilities. *See generally* 42 U.S.C. § 12112. Conversely, Title II applies only to public entities, protecting qualified disabled individuals from being excluded from "participation in or [from being] denied the benefits of services, programs, or activities of a public entity, or [from being] subjected to discrimination by any such entity." *See generally* 42 U.S.C. § 12132. Interestingly, even the Court in *Toeller* noted the potential distinction between *Garrett's* treatment of Titles I and II of the ADA and the FMLA in reasoning that the courts in *Brockman* and *Touvell* "implicitly decided that the Supreme Court would be willing to evaluate the statute not only on a title by title basis, as the court had done with the ADA in *Garrett* . . . , but on a subsection by subsection basis." *Toeller*, 461 F.3d at 878.

applicable to the entire Act and held that "neither the language of the FMLA nor the legislative record provides an indication that the self-care provision should be treated differently from the family-care provision at issue in *Hibbs*." 765 N.W.2d 607, *appeal docketed*, No. 07-1879 (Iowa Ct. App. 2009).[9]

A dissenting judge in *Laro* made a similar argument. 259 F.3d at 17 (1st Cir. 2001) (Lipez, J., dissenting). Because Congress enacted the FMLA as a prophylactic measure against gender discrimination, it is "inappropriate to evaluate in isolation a personal medical leave provision that supplements the caretaking provisions of the FMLA with an important protection for women against gender discrimination in employment." *Id.* at 17-18.

The proper method for analyzing the FMLA's legislative history to determine whether Congress validly abrogated Eleventh Amendment immunity in the self-care provision remains unclear. Specifically, what the legislative history needs to contain to clearly abrogate Eleventh Amendment immunity and whether that history applies to the statute as a whole or in part are important questions that this Court needs to resolve.[10] The answer to these questions

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[9] *Lee* is a table decision and its opinion is available on Westlaw. The appeal is currently pending before the Iowa Supreme Court.

[10] *See Maitland v. Univ. of Minn.*, 260 F.3d 959, 965 (8th Cir. 2001) (stating the Constitution does not require point-by-point

(Continued on following page)

affects Congress' ability to legislate effectively, states' Eleventh Amendment immunity interests, and federal interests in ensuring qualified employees' right to protected leave from work under the FMLA.

III. GIVEN THE CONFLICTING POSITIONS TAKEN BY THE UNITED STATES ON THIS ISSUE AND BECAUSE IT PRESENTS AN IMPORTANT AND RECURRING CONSTITUTIONAL ISSUE, IT WARRANTS THIS COURT'S RESOLUTION.

The Court has repeatedly recognized the need to resolve issues of Eleventh Amendment immunity by granting review in controversies involving other sections of the FMLA and other employment statutes.[11] Additionally, the volume of cases addressing whether the FMLA's self-care provision is a valid exercise of congressional power under the Fourteenth Amendment

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parsing of the legislative history to determine whether section 5 statutes are congruent and proportional).

[11] *See Hibbs*, 538 U.S. 721 (granting certiorari and holding that Congress validly abrogated Eleventh Amendment immunity as to the FMLA's family-care leave provision); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (granting certiorari and holding the Age Discrimination in Employment Act (ADEA) did not abrogate states' Eleventh Amendment immunity because age was a non-suspect class, and therefore, the ADEA failed the congruence and proportionality test); *Garrett*, 531 U.S. 356 (granting certiorari and holding that the rights and remedies created by the ADA against the states raised concerns as to congruence and proportionality, supporting a determination that Congress did not validly abrogate Eleventh Amendment immunity).

demonstrates the importance of this issue. Including both pre-*Hibbs* and post-*Hibbs* cases, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits,[12] and numerous district courts[13] and state courts[14] have been asked to consider the constitutionality of the FMLA's self-care provision.

Since *Hibbs*, the issue has been the subject of at least three petitions for certiorari.[15] In light of the

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[12] *See, e.g.*, *Laro*, 259 F.3d 1; *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000); *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000); *Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010); *Nelson*, 535 F.3d 318; *Touvell*, 422 F.3d 392; *Toeller*, 461 F.3d 871; *Miles*, 481 F.2d 1106; *Hibbs v. Nevada Department of Human Resources*, 273 F.3d 844 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003); *Brockman*, 342 F.3d 1159; *Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F.3d 1214 (11th Cir. 1999), *rev'd sub nom., Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).

[13] *Darby v. Hinds County Dep't of Human Servs.*, 83 F. Supp. 2d 754 (S.D. Miss. 1999); *Williamson v. Ga. Dep't of Human Res.*, 150 F. Supp. 2d 1375 (S.D. Ga. 2001); *Livitis v. County of Luzerne*, 52 F. Supp. 2d 403 (M.D. Pa. 1999); *Serafin v. Conn. Dep't of Mental Health & Addiction Servs.*, 118 F. Supp. 2d 274 (D. Conn. 2000); *Knussman v. Maryland*, 935 F. Supp. 659 (D. Md. 1996); *Jolliffe v. Mitchell*, 986 F. Supp. 339 (W.D. Va. 1997).

[14] *See, e.g.*, *UTEP v. Herrera*, 322 S.W.3d 192 (Tex. 2010); *Lee v. State*, 765 N.W.2d 607 (Iowa Ct. App. 2009), *appeal docketed*, No. 07-1879 (Iowa Sup. Ct. 2008); *Nicholas v. Att'y Gen.*, 168 P.3d 809 (Utah 2007); *Lizzi v. Wash. Metro. Area Transit Auth.*, 862 A.2d 1017 (Md. 2004).

[15] *See, e.g.*, Petition for Writ of Certiorari, *Touvell v. Ohio Dep't of Mental Retardation & Dev. Disabilities*, 546 U.S. 1173 (2006) (No. 05-752); Petition for Writ of Certiorari, *Matthews v. Military Dept., State of Louisiana*, 129 S.Ct. 82 (2008) (No. 07-1435); Petition for Writ of Certiorari, *Montgomery v. Maryland*, 535 U.S. 1075 (2002) (No. 01-1079).

significant and recurring nature of the question presented, this Court should not delay in resolving the issue.

Furthermore, the fact that the United States has taken inconsistent positions on the issue indicates that this Court should provide guidance and clarity. At the very least, this Court should request that the United States clarify its position. In *Laro,* the United States vigorously defended the constitutionality of the self-care provision on the ground that it was enacted to prevent gender discrimination against both men and women. Supplemental Brief of Intervenor United States of America, *Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001) (No. 00-1581), 2001 WL 36019418. In a supplemental brief filed to address the Supreme Court's then-recent decision in *Garrett*, the United States was very specific: "*Garrett* did not alter the relevant inquiry for determining whether Congress has acted within the scope of its Fourteenth Amendment power . . . [Congress'] attempt to remedy employment practices based on gender stereotypes falls within its Fourteenth Amendment powers." *Id.*

In 2002, consistent with its position in *Laro*, the United States filed a brief in *Bylsma v. Freeman* supporting the constitutionality of the FMLA, including the self-care provision. Brief of the United States as Intervenor-Appellant, *Bylsma v. Freeman*, 346 F.3d 1324 (11th Cir. 2003) (No. 01-16102 AA), 2002 WL 32366215. The United States emphatically argued that the FMLA abrogated Eleventh Amendment immunity through a proper exercise of section 5 authority. *Id.* at

*9-11. While the controversy in *Bylsma* focused on the family-leave provision of the FMLA, much of the government's brief was non-specific, indicating that "[t]he FMLA directly remedies discrimination against men, by affording men the leave that they are often denied." *Id.* at *9.

Despite its defense of the self-care provision's constitutionality in *Bylsma* and *Laro*, the Office of the Solicitor General filed a Brief in Opposition in *Hibbs*, stating that it was "lodging with the Court copies of letters from the Solicitor General notifying Congress of his decision to decline further defense of the abrogation of Eleventh Amendment immunity for claims brought under 29 U.S.C. 2612(a)(1)(D)." Brief for the United States in Opposition, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368), 2002 WL 32135355, at *8 n.2. The government further explained that in light of the Supreme Court's decision in *Garrett*, the Solicitor General would "take the extraordinary step of abandoning further constitutional defense of the abrogation of Eleventh Amendment immunity for the individual sick leave provision." *Id.* at *8.

The Solicitor General's letters to Congress gave two reasons for the Office's refusal to defend the self-care provision. First, the letter indicated frustration with the eight circuit court decisions rendered before *Hibbs* that had rejected the Solicitor General's

arguments in defense of the provision. App. 22.[16] Second, the Solicitor General relied on the reasoning in the *Garrett* decision. The letter reasoned that while the *Garrett* decision was only aimed at the ADA, the decision "effectively eliminated [its] ability to defend the medical-leave provision as protecting against discrimination on the basis of temporary disability." App. 23. Finally, the letter indicated that this position will only be held by the Office "absent changed circumstances." App. 22.

The *Hibbs* decision undermined the rationale of many of the circuit court decisions referenced in the Solicitor General's letter. Further, as discussed above, the United States Government had vigorously defended Congress' abrogation of Eleventh Amendment immunity, not only as an appropriate response to disability-based discrimination, but also to address gender-based discrimination perpetrated by the states.

Hibbs represents a change in circumstances substantial enough to warrant a policy review by the United States. The United States has not taken any clear position on this issue in the Court since *Hibbs*, and the very text of the letter begs the question as to what the United States' position is in light of *Hibbs*. Because the Government's defense of the constitutionality of the self-care provision has been inconsistent,

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[16] Letter from Theodore Olson, Solicitor General, to Richard Cheney, President of the Senate (Dec. 20, 2001) (on file with the Supreme Court of the United States). The letter is attached as an appendix. App. 21. A similar letter was sent to J. Dennis Hastert, Speaker of the House. We have not reproduced it.

this Court should grant certiorari, and resolve this important question.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fourth Circuit. Additionally, this Court should invite the Solicitor General to file a brief in this matter expressing the position of the United States.

Respectfully submitted this 8th day of February, 2011.

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626 F.3d 187
United States Court of Appeals,
Fourth Circuit.

Daniel COLEMAN, Plaintiff-Appellant,
v.
MARYLAND COURT OF APPEALS; Frank Broccolina, State Court Administrator; Larry Jones, Contract Administrator, Defendants-Appellees.

No. 09-1582.Argued: Sept. 23, 2010.
Decided: Nov. 10, 2010.

Attorneys and Law Firms

ARGUED: Edward Smith, Jr., Law Office of Edward Smith, Jr., Baltimore, Maryland, for Appellant. Hugh Scott Curtis, Office of the Attorney General of Maryland, Baltimore, Maryland, for Appellees. **ON BRIEF:** Douglas F. Gansler, Attorney General, Kendra Y. Ausby, Assistant Attorney General, Office of the Attorney General of Maryland, Baltimore, Maryland, for Appellees.

Before TRAXLER, Chief Judge, SHEDD, Circuit Judge, and James C. DEVER III, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Opinion

Affirmed by published opinion. Chief Judge TRAXLER wrote the opinion, in which Judge SHEDD and Judge DEVER joined.

OPINION

TRAXLER, Chief Judge:

Daniel Coleman appeals the dismissal of his amended complaint in this suit alleging, as is relevant here, violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), *see* 42 U.S.C.A. §§ 2000e to 2000e-17 (West 2003 & Supp.2010), and of the Family and Medical Leave Act of 1993 ("FMLA"), *see* 29 U.S.C.A. §§ 2601-54 (West 2009 & Supp.2010). Finding no error, we affirm.

I.

Coleman's Title VII claim was dismissed for failure to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). In reviewing such a dismissal, we accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *See Flood v. New Hanover Cnty.*, 125 F.3d 249, 251 (4th Cir.1997). Viewed through that lens, the facts for purposes of this appeal are as follows.

Coleman, an African-American male, was employed by the Maryland Court of Appeals from March 2001 to August 2007 and served as executive director of procurement and contract administration since early 2003. Coleman was supervised by Frank Broccolina, a white male, and Faye Gaskins, whose race is not specified. Larry Jones, whose race also is not specified, was a member of Coleman's staff and

was related to Gaskins. In October 2005, Coleman investigated a matter involving Jones and Joyce Shue, a white female. Coleman's investigation "resulted in a five (5) day suspension" for Jones. J.A. 21. After Broccolina and Gaskins intervened, however, Jones's suspension was reduced to only one day. In retaliation for Coleman's investigation, Jones falsely alleged that Coleman had steered contracts to vendors in which Coleman had an interest, and Jones encouraged Broccolina to investigate. Broccolina, in turn, shared the allegations with others despite knowing that they were false.

During his employment, Coleman satisfied the performance standards of his position and received all applicable "raises and increments." J.A. 26. However, in early April 2007, he received a letter of reprimand from Gaskins concerning "a communication protocol." J.A. 25. Coleman's appeal of the reprimand was unsuccessful. Then, on August 2, 2007, Coleman sent Broccolina a sick-leave request "based upon a documented medical condition." J.A. 26. Broccolina contacted Coleman the next day and informed him that he would be terminated if he did not resign. Coleman alleges that he was fired for requesting sick leave and because he is black. He also alleges that the contract-steering charge played a role in his termination.

After exhausting his administrative remedies, Coleman initiated the present action. The complaint before us names Broccolina, Jones, and the Maryland Court of Appeals as defendants and alleges violations

of Title VII and the FMLA.[1] On defendants' motion, the district court dismissed the Title VII claim on the grounds that Coleman failed to state a claim for which relief could be granted, *see* Fed.R.Civ.P. 12(b)(6), and dismissed the FMLA claim on the basis that it was barred by Eleventh Amendment immunity, *see* Fed.R.Civ.P. 12(b)(1).

II.

Arguing that the complaint properly alleged both a claim for disparate treatment and a claim for retaliation, Coleman maintains that the district court erred in dismissing his Title VII cause of action. We disagree.

We review de novo the grant of a motion to dismiss under Rule 12(b)(6). *See Sucampo Pharm., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir.2006). When ruling on such a motion, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam) (citations omitted). A complaint "need

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[1] The district court construed Coleman's complaint as asserting the FMLA claim against Broccolina and Jones in their official capacities only. Coleman does not challenge that interpretation on appeal.

Coleman's complaint also includes a state-law claim for defamation. The district court dismissed that claim as barred by the Eleventh Amendment and the Maryland Tort Claims Act. Coleman does not challenge the dismissal of that claim.

only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Id.* at 93, 127 S.Ct. 2197 (alteration and internal quotation marks omitted). However, to survive a motion to dismiss, the complaint must "state[ ] a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct" based upon "its judicial experience and common sense." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009). In this regard, while a plaintiff is not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss, *see Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-15, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). *See also Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir.2009).

Title VII prohibits an employer from "discharg[ing] any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C.A. § 2000e-2(a). Absent direct evidence, the elements of a prima facie case of discrimination under Title VII are: (1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class. *See White v. BFI Waste Servs., LLC*, 375 F.3d 288, 295 (4th

Cir.2004). Title VII also prohibits employers from "discriminat[ing] against any of [their] employees . . . because [the employees] ha[ve] opposed any practice made an unlawful employment practice by [Title VII], or because [the employees] ha[ve] . . . participated in any manner in an investigation" under Title VII. 42 U.S.C.A. § 2000e-3(a). The elements of a prima facie retaliation claim under Title VII are: (1) engagement in a protected activity; (2) adverse employment action; and (3) a causal link between the protected activity and the employment action. *See Mackey v. Shalala,* 360 F.3d 463, 469 (4th Cir.2004).

Here, although Coleman's complaint conclusorily alleges that Coleman was terminated based on his race, it does not assert facts establishing the plausibility of that allegation. The complaint alleges that Jones and Broccolina began their campaign against Coleman in retaliation for his investigation of Jones's conflict with Shue. The complaint further alleges that Coleman "was treated differently as a result of his race than whites" and specifically identifies Broccolina as a white person who was not disciplined despite having "outside business involvements." J.A. 21-22, 25 (emphasis omitted). However, the complaint fails to establish a plausible basis for believing Broccolina and Coleman were actually similarly situated or that race was the true basis for Coleman's

termination.[2] The complaint does not even allege that Broccolina's "outside business involvements" were improper, let alone that any impropriety was comparable to the acts Coleman was alleged to have committed.[3] Absent such support, the complaint's allegations of race discrimination do not rise above speculation. Thus, the district court correctly concluded that the complaint failed to state a Title VII race discrimination claim. *See Iqbal,* 129 S.Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

The district court also correctly ruled that Coleman failed to state a Title VII retaliation claim. No facts in the complaint identify any protected activity by Coleman that prompted the retaliation of which he complains. Coleman maintains that his protected activity was his intervention in the conflict between Jones and Shue. However, the complaint does not explain why Coleman's investigation would be considered protected activity. We therefore affirm the dismissal of the Title VII claim.

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[2] The complaint also conclusorily alleges that Coleman was given his letter of reprimand because of his race, but no factual allegations lend any plausibility to this claim either.

[3] The notion that Broccolina's "outside business interests" might make him similarly situated to Coleman is also muddled by Coleman's allegation that Broccolina and Jones knew that the allegations of contract steering against Coleman were false.

III.

Coleman next contends that the district court erred in dismissing his FMLA claim on the basis of Eleventh Amendment immunity. Specifically, he argues that the district court erred in concluding that Congress unconstitutionally abrogated the states' Eleventh Amendment immunity with respect to the FMLA's self-care provision. We disagree.

The Eleventh Amendment bars suit in federal court against an unconsenting state and any governmental units that are arms of the state unless Congress has abrogated the immunity. *See Alden v. Maine*, 527 U.S. 706, 755-57, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). In order to do so, Congress must unequivocally declare its intent to abrogate and must act pursuant to a valid exercise of its power. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). The first prong of this test is clearly satisfied here. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (explaining that "[t]he clarity of Congress' intent" to abrogate the states' immunity to FMLA suits "is not fairly debatable"). It is the second requirement that is at issue.

The Supreme Court has held that while Congress cannot validly abrogate a state's immunity from private suit under its Article I powers, it can do so under its Fourteenth Amendment, § 5 authority. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The

Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Section 5 authorizes Congress to enact "appropriate legislation" to enforce these substantive guarantees. *Id.* § 5. This section authorizes Congress not only to codify the Supreme Court's holdings regarding the rights established by the Fourteenth Amendment, but also to prevent future violations of those rights. *See City of Boerne v. Flores*, 521 U.S. 507, 518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Although Congress may "enact prophylactic legislation prohibiting conduct that is 'not itself unconstitutional,' it may not substantively redefine Fourteenth Amendment protections." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 484-85 (4th Cir.2005) (citing *City of Boerne*, 521 U.S. at 519, 117 S.Ct. 2157). The Supreme Court has held that to ensure Congress abides by this distinction, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520, 117 S.Ct. 2157.

As originally enacted, the FMLA authorized qualified employees to take up to 12 weeks of unpaid leave annually in four circumstances, three of which concern caring for family members: bearing and

caring for a child, *see* 29 U.S.C.A. § 2612(a)(1)(A), adopting or providing foster care for a child, *see id.* § 2612(a)(1)(B), and caring for a spouse, child, or parent with a serious health condition, *see id.* § 2612(a)(1)(C). The fourth circumstance is when "a serious health condition ... makes the employee unable to perform the functions of [his] position." *Id.* § 2612(a)(1)(D). Congress has subsequently amended the FMLA to also authorize leave because of an exigency arising out of the fact that an employee's spouse, child, or parent is on covered active duty, or has been notified of an impending call to such duty in the armed forces. *See* National Defense Authorization Act for Fiscal Year 2008, Pub.L. No. 110-181, § 585, 122 Stat. 3 (2008) (codified at 29 U.S.C.A. § 2612(a)(1)(E)). The FMLA creates a private right of action for equitable relief or money damages against any employer that denies its employee his FMLA rights. *See id.* §§ 2615(a), 2617(a).

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), on which Coleman relies, the Supreme Court addressed whether the FMLA's third provision, relating to caring for a family member with a serious health condition, constituted a valid abrogation of the states' sovereign immunity. In concluding that it was, the Court determined that Congress had enacted the FMLA in response to "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits." *Hibbs*, 538 U.S. at 735, 123 S.Ct. 1972; *see*

also id. at 731, 123 S.Ct. 1972 (describing the gender gap in state leave policies as being the result of "the pervasive sex-role stereotype that caring for family members is women's work"). The Court confirmed that a "heightened level of scrutiny" applied to gender discrimination, *id.* at 736, 123 S.Ct. 1972, which requires that classifications distinguishing between different genders be substantially related to the achievement of important governmental objectives. *See id.* at 728, 123 S.Ct. 1972. The Court held that the test was satisfied in the case of § 2612(a)(1)(C) because it was "narrowly targeted at the fault-line between work and family – precisely where sex-based overgeneralization has been and remains strongest." *Id.* at 738, 123 S.Ct. 1972. As *Hibbs* concerned only this family-care provision, § 2612(a)(1)(C), the Court did not discuss whether Congress validly abrogated states' immunity with regard to the self-care provision, § 2612(a)(1)(D).

The Court's analysis, focused as it is on the gender-related nature of § 2612(a)(1)(C), does not support the validity of Congress's abrogation of sovereign immunity for violations of § 2612(a)(1)(D).[4]

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[4] Before *Hibbs* was decided, we held that Congress exceeded its authority in applying the FMLA to the States. *See Lizzi v. Alexander*, 255 F.3d 128, 134-36 (4th Cir.2001). Although *Lizzi* involved self-care leave, and thus would seem to be on point, the opinion's rationale was not specific to the self-care provision. Instead, it addressed congressional authority in more general terms, concluding that Congress "does not have the constitutional power to pass such a sweeping statute on the basis of

(Continued on following page)

And, the legislative history accompanying the FMLA shows that preventing gender discrimination was not a significant motivation for Congress in including the self-care provision; rather, Congress included that provision to attempt to alleviate the economic effect on employees and their families of job loss due to sickness and also to protect employees from being discriminated against because of their serious health problems. *See Brockman v. Wyoming Dep't of Family Servs.*, 342 F.3d 1159, 1164 (10th Cir.2003); S.Rep. No. 103-3, at 11-12 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 13-14; H.R.Rep. No. 101-28(I), at 23 (1990). Moreover, even had Congress *intended* the self-care provision to be protection against gender discrimination, Congress did not adduce any evidence establishing a pattern of the states as employers discriminating on the basis of gender in granting leave for personal reasons. *See Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 422 F.3d 392, 402 (6th Cir.2005); *Laro v. New Hampshire*, 259 F.3d 1, 10-11 (1st Cir.2001). Without such evidence, the self-care provision cannot pass the congruence-and-proportionality test. *See Touvell*, 422 F.3d at 402; *Laro*, 259 F.3d at 10-11.

Absent a showing that the self-care provision is congruent and proportional to a Fourteenth Amendment injury that Congress enacted the provision to

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[gender discrimination]." *Id.* at 135. That analysis is no longer valid in light of *Hibbs*.

remedy, Coleman is left to argue that we should simply evaluate the FMLA's immunity abrogation as a whole rather than considering the self-care provision individually. But we know of no basis for adopting such an undifferentiated analysis or concluding that the *Hibbs* Court did so. *See Tennessee v. Lane*, 541 U.S. 509, 530-31, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) ("[N]othing in our case law requires us to consider Title II [of the Americans with Disabilities Act], with its wide variety of applications, as an undifferentiated whole."); *Tbeller v. Wisconsin Dep't of Corr.*, 461 F.3d 871, 879 (7th Cir.2006) ("[W]e should – indeed must – look at each provision of the [FMLA] separately, even though we should also evaluate each provision in context."). Indeed, the *Hibbs* Ccurt took pains throughout its opinion to make clear that the case it was deciding concerned only the family-leave portion of the FMLA. *See, e.g., Hibbs*, 538 U.S. at 725, 123 S.Ct. 1972 ("We hold that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act."); *id.* at 737, 123 S.Ct. 1972 ("We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is congruent and proportional to the targeted violation." (internal quotation marks omitted)); *id.* at 740, 123 S.Ct. 1972 ("[W]e conclude that § 2612(a)(1)(C) is congruent and proportional to its remedial object.").

We note that since *Hibbs* was decided, each of the four circuit courts to consider the issue has concluded that Congress did not validly abrogate sovereign

immunity as to the FMLA's self-care provision. *See Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 321 (5th Cir.2008); *Toeller*, 461 F.3d at 877-79; *Touvell*, 422 F.3d at 398-405; *Brockman*, 342 F.3d at 1164-65. We now join these circuits. Because we hold that Congress did not validly abrogate the states' immunity, we conclude that the district court properly dismissed Coleman's FMLA claim as barred by the Eleventh Amendment.

IV.

In sum, holding that Coleman's complaint fails to state a Title VII claim for which relief could be granted and that his FMLA claim is barred by sovereign immunity, we affirm the district court's dismissal of Coleman's action.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL COLEMAN,	*	
Plaintiff	*	
	*	
v.	*	
	*	Civil No. L-08-2464
MARYLAND COURT	*	
OF APPEALS, FRANK	*	(Filed May 7, 2009)
BROCCOLINA, and	*	
LARRY JONES,	*	
Defendants	*	

****

ORDER

Plaintiff Daniel Coleman was an employee at the Maryland Court of Appeals from 2001 until he was terminated in 2007. Mr. Coleman, an African American, claims race-based employment discrimination under Title VII (Count I), violation of the Family Medical Leave Act ("FMLA") (Count II), and defamation (Count III) against the Maryland Court of Appeals and two of its employees, his supervisor, Frank Broccolina, and a co-worker, Larry Jones.[1]

Now pending is Defendants' Motion to Dismiss the Amended Complaint (Docket No. 8). No hearing is necessary as the motions have been fully briefed. *See*

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[1] The Amended Complaint does not present formally numbered Courts.

Local Rule 105.6 (D. Md. 2008). For the reasons set forth below, Defendants' Motion must be GRANTED.

Count I: Title VII

Plaintiff's Amended Complaint is devoid of any facts from which to infer race-based discrimination, a pleading requirement of a Title VII claim. Plaintiff does not even claim his termination was race-related. Instead, Plaintiff repeats throughout his complaint the same conclusory allegation: "he was treated differently as a result of his race than white employees who were similarly situated." Without a factual basis to support such an allegation, it is insufficient to state a claim under Title VII. *Luy v. Baltimore Police Dep't*, 326 F. Supp. 2d 682, 689 (D. Md. 2004); *see also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Accordingly, Plaintiff's Title VII claim (Count I) must be dismissed.

Count II: FMLA

Mr. Coleman's FMLA claim is barred by the Eleventh Amendment. Mr. Coleman alleges he sought sick leave on August 2, 2007 for a personal illness and was placed under a doctor's care for ten days. Amend. Compl. ¶ 30-31. Under the terminology of the FMLA, this is considered "self-care" because Mr. Coleman was seeking leave to care for his own illness, rather than "family-care" to care for a family member. Mr. Coleman further alleges that Mr. Broccolina, his supervisor, retaliated against him on August 3, 2007

by forcing him to choose between being terminated immediately or taking 30 days administrative leave and then resigning. Amend. Compl. ¶ 32.[2] Thus, Mr. Coleman's FMLA retaliation claim is pursuant to that statute's "self-care" provision. *See* 29 U.S.C. § 2612(a)(1)(D).

Nevertheless, Plaintiff's claim against the state must fail because, according to the universal agreement of the Federal Courts of Appeals that have considered the issue, Congress unconstitutionally abrogated state sovereign immunity with respect to the FMLA's self-care provision. *Toeller v. Wisconsin Dep't of Corrections*, 461 F.3d 871, 879-880 (7th Cir. 2006); *Touvell v. Ohio Dep't of Mental Retardation and Dev. Disabilities*, 422 F.3d 392, 400 (6th Cir. 2005); *Brockman v. Wyoming Dep't of Family Servs.*, 342 F.3d 1159, 1165 (10th Cir. 2003). The Court sees no reason to depart from the reasoning or holding of those cases here.

Further, in 2001, the Fourth Circuit held that the FMLA, in its entirety, unconstitutionally abrogated state sovereign immunity. *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001). That holding was overruled in

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[2] His termination, Plaintiff Coleman explains, was preceded by a long internal investigation of Coleman begun in 2005, a formal reprimand on April 10, 2007, and his unsuccessful appeal of that reprimand to the Chief Judge of the Maryland Court of Appeals, which was denied on June 22, 2007. Five weeks later, on August 3, 2007, Plaintiff alleges he was offered the choice to resign or be terminated.

part by *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), but only as it pertained to the family-care provisions of FMLA. *Hibbs* did not address the FMLA's self-care provision. After reviewing *Hibbs*, *Lizzi*, and similar cases, the Sixth Circuit held: "We do not believe that *Hibbs* undermines the holdings of the First, Second, Fourth [*Lizzi v. Alexander*], Tenth, and Eleventh Circuits that the self-care provision of the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity." *Touvell*, 422 F.3d at 400; *cf. Lizzi v. Washington Metropolitan Area Transit Authority*, 862 A.2d 1017 (Md. 2004) (concurring with *Brockman* that the self-care provision unconstitutionally abrogates state sovereign immunity). Accordingly, Plaintiff's FMLA claim must be dismissed.

The Amended Complaint does not state whether the FMLA claim is brought against Messrs. Broccolina and Jones in their official or personal capacities. Unlike claims brought under the "broad enforcement vehicle" of 42 U.S.C. § 1983 for constitutional or federal torts, the Fourth Circuit construes FMLA claims against individual state defendants as official capacity claims absent clear facts to the contrary that would expose them to personal liability. *Lizzi v. Alexander*, 255 F.3d 128, 136-138 (4th Cir. 2001) *overruled in part on other grounds by, Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003). Mr. Coleman alleges no such facts.

Further, Messrs. Broccolina and Jones are immune from suit. *See* MD. CODE ANN., CTS. & JUD.

PROC. ART. § 5-522(b). The Complaint is again devoid of factual allegations that suggest Mr. Broccolina acted outside the scope of his public duties and/or with malice or gross negligence in terminating Mr. Coleman. Accordingly, Mr. Broccolina must be afforded immunity. *See* § 5-522(b). As for Mr. Jones, he was former co-worker of Mr. Coleman's and had no supervisory role over him. Without a supervisory role over Mr. Coleman, Mr. Jones cannot be held individually liable for any purported FMLA violation arising from Mr. Coleman's termination. In sum, the facts alleged by Mr. Coleman's FMLA claim, coupled with the relief he seeks (reinstatement, back pay, etc.), makes it clear that Defendants are sued in their official capacities for their alleged conduct as a single entity.

Count III: Defamation

Plaintiffs defamation claim is likewise barred by the Eleventh Amendment and procedurally deficient under the Maryland Tort Claims Act. Congress has not abrogated Maryland's sovereign immunity to tort suits in federal court. Rather, Mr. Coleman may only sue the state pursuant to the Maryland Tort Claims Act ("MTCA"). *See* MD. CODE ANN., STATE GOV'T ART. § 12-101 *et seq*. The MTCA prohibits suit against the state unless a claimant satisfies a non-discretionary condition precedent: he must first submit the claim to the State Treasurer and the State Treasurer must deny the claim. § 12-106(b); *Simpson v. Moore*, 592 A.2d 1090, 1097 (Md. 1991). Mr. Coleman's defamation claim must be dismissed as it is incurably

procedurally deficient because he failed to first file his claim with the State Treasurer within the allotted timeframe.[3]

Therefore, for the reasons stated above, the Court will (i) GRANT Defendants' Motion to Dismiss the Amended Complaint (Docket No. 8), (ii) DISMISS the case, and (iii) DIRECT the Clerk to CLOSE the case.

It is so ordered this 7th day of May, 2009

/s/
Benson Everett Legg
Chief Judge
United States District Court

[3] To the extent that Plaintiff states a claim for defamation under Maryland law against Broccolina and Jones individually and in their personal capacities, the Court declines to exercise pendant jurisdiction over such claims. *See* 28 U.S.C. § 1367(c)(3).

[SEAL] **U. S. Department of Justice**
Office of the Solicitor General

Solicitor General *Washington, D.C. 20530*

December 20, 2001

The Honorable Richard B. Cheney
President of the Senate
United States Senate
Washington, DC 20510

RE: Bates v. Indiana Dep't of Corrections, No. IP01-1159-C-H/G (S. D. Ind.)

Dear Mr. President:

I am writing to advise you that, after extensive consideration, I have determined that the Department of Justice will not continue to intervene in cases to defend the abrogation of Eleventh Amendment immunity effected by the medical leave provision of the Family and Medical Leave Act, 29 U.S.C. 2612(a)(1)(D), as appropriate legislation under Section 5 of the Fourteenth Amendment. The medical leave provision, among other things, requires state employers to provide twelve weeks of leave a year to eligible employees if needed "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." The Act further authorizes aggrieved employees to file suit against state employers to enforce the medical leave provisions for damages and equitable relief. 29 U.S.C. 2617(a).

The present case involves a suit against the Indiana Department of Corrections. The State has defended, in part, on the ground that the Eleventh Amendment bars the suit. The district court notified the Attorney General that the constitutionality of the abrogation had been drawn into question in the litigation, pursuant to 28 U.S.C. 2403, and invited the Department to intervene.

I have determined not to intervene in this case or, absent changed circumstances, in any future medical-leave case where the constitutionality of the Family and Medical Leave Act's abrogation of Eleventh Amendment immunity is drawn into question. The Department has attempted to defend the abrogation in eight courts of appeals, all of which have flatly rejected our arguments. See *Laro* v. *New Hampshire*, 259 F.3d 1 (1st Cir. 2001); *Hale* v. *Mann*, 219 F.3d 61 (2d Cir. 2000); *Chittister* v. *Department of Comm. & Econ. Development*, 226 F.3d 223 (3d Cir. 2000); *Lizzi* v. *Alexander*, 255 F.3d 128 (4th Cir. 2001); *Kazmier* v. *Widmann*, 225 F.3d 519 (5th Cir. 2000); *Sims* v. *University of Cincinnati*, 219 F.3d 559 (6th Cir. 2000); *Townsel* v. *Missouri*, 233 F.3d 1094 (8th Cir. 2000); *Garrett* v. *University of Alabama Bd. of Trustees*, 193 F.3d 1214 (11th Cir. 1999), rev'd on other grounds, 531 U.S. 356 (2001). Moreover, the Supreme Court's decision last term in *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001), which held that Title I of the Americans with Disabilities Act, 42 U.S.C. 12111 to 12117, is not appropriate Section 5 legislation, effectively eliminated our ability to defend

the medical-leave provision as protecting against discrimination on the basis of temporary disability. The Supreme Court's analysis and holding in *Garrett* has left the Department with no sound basis to continue defending the abrogation of Eleventh Amendment immunity in this or other medical-leave cases under the Family and Medical Leave Act.

I wish to emphasize that this decision is confined to the medical-leave provision of the Act; no corresponding decision has been made to discontinue defense of the abrogation of Eleventh Amendment immunity for cases arising under the parental and family leave provisions of the Act. Further, this decision is limited to the constitutional question of abrogating Eleventh Amendment immunity. We will defend the substantive medical-leave provision, as applied to private employers, as an appropriate exercise of Congress's Commerce Clause power. Likewise, we continue to believe that state employees may enforce the substantive medical-leave provision through actions for equitable relief (but not monetary damages) if suit is brought against a state official under *Ex parte Young*, 209 U.S. 123 (1908).

If your office wishes to participate in this litigation, we will be happy to notify the district court and

seek an appropriate extension of time to accommodate your filing.

Very truly yours,

/s/ Theodore B. Olson
Theodore B. Olson

Enclosure

cc: The Honorable Patricia Mack Bryan
Senate Legal Counsel

OPPOSITION BRIEF

No. 10-1016

Supreme Court, U.S.
FILED
MAY 31 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DANIEL COLEMAN,

Petitioner,

v.

MARYLAND COURT OF APPEALS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals correctly conclude – consistent with the unanimous view of the five other courts of appeals to consider the issue following this Court's decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) – that the States retain sovereign immunity from claims for money damages made under the "self-care" provision of the Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(D)?

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STATEMENT OF THE CASE

1. Congress enacted the Family and Medical Leave Act of 1993 ("FMLA") "to promote the goal of equal employment opportunity for women and men." 29 U.S.C. § 2601(b)(5). Congress found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5). Congress also found that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants . . . who are of that gender." 29 U.S.C. § 2601(a)(6). In response to the effects of past gender discrimination and stereotyping in employment that it had found, Congress acted to regulate employee leave policies "in a manner that . . . minimizes the potential for employment discrimination on the basis of sex" by ensuring that leave is available "on a gender-neutral basis." 29 U.S.C. § 2601(b)(4).

As originally enacted, the FMLA authorized qualified employees to take up to 12 weeks of unpaid leave annually in four circumstances, three of which concern caring for family members: bearing and caring for a child, *see* 29 U.S.C. § 2612(a)(1)(A), adopting or providing foster care for a child, *see* § 2612(a)(1)(B), and caring for a spouse, child, or parent with a serious health condition, *see* § 2612(a)(1)(C). The fourth circumstance, and the one

at issue here, applies when "a serious health condition . . . makes the employee unable to perform the functions" of his or her job. 29 U.S.C. § 2612(a)(1)(D).[1]

The FMLA creates a private right of action permitting an employee to sue an employer for injunctive relief or money damages if the employer has denied the employee rights afforded under the FMLA. *See* 29 U.S.C. §§ 2615(a), 2617(a). The Secretary of Labor may also conduct investigations and bring civil actions to enforce the FMLA. *See* 29 U.S.C. § 2617(b), (d).

2. Petitioner Daniel Coleman, an African-American male was employed by the Administrative Office of the Courts for the Maryland judiciary, where he was responsible for matters related to contract administration and procurement. Pet. App. 5. Respondents Frank Broccolina and Larry Jones were also employees there. Pet. App. 15. The third Respondent is Maryland's highest court, whose Chief Judge is responsible for supervising the administrative operations of the court system. *See* Md. Code Ann., Cts. & Jud. Proc. § 13-101.

In August 2007, Mr. Coleman was terminated from his employment. Pet. App. 3. Mr. Coleman alleges that his termination was preceded by an internal investigation begun in 2005, a reprimand in

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[1] More recently, Congress has amended the FMLA to authorize leave because of an exigency arising from a relative's service in the military. *See* 29 U.S.C. § 2612(a)(1)(E).

April 2007, and the Chief Judge's rejection of Mr. Coleman's appeal of that reprimand. Pet. App. 17 n.2. Mr. Coleman alleges that he sent Mr. Broccolina a sick-leave request for a personal illness on August 2, 2007, and that, on August 3, Mr. Broccolina contacted Mr. Coleman to inform him that he was being offered the choice of being terminated immediately or taking 30 days administrative leave and then resigning. Pet. App. 3, 16-17.

3. On September 19, 2008, Mr. Coleman initiated this action in the United States District Court for the District of Maryland. Pet. App. 3; J.A. 2. His complaint named the respondents as defendants and alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and the FMLA; it also asserted a state-law defamation claim. Pet. App. 3-4 & n.1. Mr. Coleman alleged that he was fired because he requested sick leave and because he is black; he also alleged that Mr. Jones and Mr. Broccolina had falsely accused him of having abused his position to steer procurement contracts and that these accusations also played a role in his termination. Pet. App. 3. The complaint also alleged that the letter of reprimand he had received in April 2007 was issued because of his race. Pet. App. 7 n.2.

On the same day he filed this action in federal court, Mr. Coleman, represented by the same counsel, filed a complaint in the Circuit Court for Baltimore

City, in which he named the same defendants.[2] The two complaints contained 41 virtually identical paragraphs, advanced the same three causes of action, and requested the same six forms of relief. The allegations made in the state-court complaint that pertain to Mr. Coleman's FMLA claim (paragraphs 30-34) are identical to the corresponding paragraphs in the federal-court complaint (paragraphs 30-34). (Mr. Coleman later amended his complaint in federal court. The same five paragraphs are unchanged except that typographical errors were corrected. J.A. 26.)

The respondents moved to dismiss the complaint in both cases, and renewed their motion in the federal action after Mr. Coleman amended his complaint. On January 15, 2009, while the motion to dismiss Mr. Coleman's amended complaint was pending in federal court, the Circuit Court for Baltimore City entered an order granting the respondents' (unopposed) motion in state court, and dismissed his claims on the merits "with prejudice." Mr. Coleman did not appeal from the state-court judgment. The federal district court

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[2] Mr. Coleman's state-court action was docketed as No. 24-C-08-005975. The docket is available through the Maryland Judiciary Case Search website, http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp. The court filings in the state-court action are not a part of the record in this case. Copies of the official docket, Mr. Coleman's complaint, and the State court's order of final judgment have been provided to counsel of record for Mr. Coleman in this Court, who did not represent him in either of the trial courts.

granted the respondents' motion and dismissed the case on May 7, 2009. Pet. App. 20.

4. In granting the respondents' Rule 12(b) motion, the district court held that Mr. Coleman had failed to state a claim under Title VII, because his complaint was "devoid of any facts from which to infer race-based discrimination." Pet. App. 16. With respect to the FMLA claim, the court determined that the leave that Mr. Coleman had sought was "'self-care' because Mr. Coleman was seeking leave to care for his own illness, rather than 'family-care' to care for a family member." Pet. App. 16. The court held that this claim under the self-care provision of the FMLA, 29 U.S.C. § 2612(a)(1)(D), was barred by the State's sovereign immunity. Pet. App. 17. The court observed that this holding was in accord with the "universal agreement of the Federal Courts of Appeals that have considered the issue" all of which had concluded that Congress had not "abrogated state sovereign immunity with respect to the FMLA's self-care provision." Pet. App. 17. The district court also dismissed Mr. Coleman's state-law defamation claim. Pet. App. 19-20.

Mr. Coleman appealed the district court's dismissal of his Title VII and FMLA claims, and the United States Court of Appeals for the Fourth Circuit affirmed. The court of appeals agreed with the district court that Mr. Coleman's complaint did not "establish a plausible basis for believing" that Mr. Coleman was treated differently from similarly situated employees or that race was the true basis for his termination.

Pet. App. 6-7. The court therefore affirmed the dismissal of Mr. Coleman's Title VII claim.

The court of appeals also agreed that Mr. Coleman's self-care claim under the FMLA was barred by the State's sovereign immunity. In analyzing this issue, the court declined to rely on circuit precedent that had held that the Eleventh Amendment bar applies to all FMLA claims, because the court recognized that the reasoning of that 2001 decision is "no longer valid in light of" this Court's decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). Pet. App. 11 n.4. Accordingly, the court of appeals proceeded to examine the Eleventh Amendment question by applying the *Hibbs* analytical framework to the FMLA's self-care provision. Pet. App. 8-14.

The court of appeals discussed the standards applied in determining whether an act of Congress has validly abrogated a state's immunity from private suits for money damages. Pet. App. 8-9. The court then discussed this Court's analysis in *Hibbs*. Pet. App. 10-11. The court of appeals observed that "*Hibbs* concerned only [the FMLA's] family-care provision," 29 U.S.C. § 2612(a)(1)(C), and its "gender-related nature," and therefore "did not discuss whether Congress validly abrogated states' immunity with regard to the self-care provision, § 2612(a)(1)(D)." Pet. App. 11. Examining the legislative history of the statute, the court of appeals observed that "preventing gender discrimination was not a significant motivation for Congress in including the self-care

provision"; rather, that provision had been enacted to "alleviate the economic effect" of job loss due to sickness and to "protect employees from being discriminated against because of their serious health problems." Pet. App. 12. The court of appeals also observed that the legislative record did not establish that "states as employers [had been] discriminating on the basis of gender in granting leave for personal reasons." Pet. App. 12. Based on these observations, the court concluded that the self-care provision "cannot pass the congruence-and-proportionality test" that this Court has articulated in its cases addressing congressional authority, under § 5 of the Fourteenth Amendment, to abrogate the states' sovereign immunity. Pet. App. 12.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted. Moreover, this case provides a poor vehicle for addressing the question presented, for two reasons – the factual record was not developed below, and a state court's final judgment against Mr. Coleman on the claim at issue here prevents him from obtaining any meaningful relief from a favorable decision by this Court.

I. The Circuit Court Holdings Are Unanimous on the Issue Presented Here.

As Mr. Coleman acknowledges, Pet. 9, six circuit courts of appeals have addressed the precise question at issue here since *Hibbs* was decided in 2001, and each of them has reached the same conclusion. *See Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010); *Nelson v. University of Texas*, 535 F.3d 318 (5th Cir. 2008); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007); *Toeller v. Wisconsin Dep't of Corr.*, 461 F.3d 871 (7th Cir. 2006); *Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 422 F.3d 392 (6th Cir. 2005), *cert. denied*, 546 U.S. 1173 (2006); *Brockman v. Wyoming Dep't of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004). Thus, it is plainly unnecessary for this Court to grant review in order to resolve any split in the circuits. *See* Sup. Ct. Rule 10(a).

Mr. Coleman argues, however, that this "appearance of unanimity . . . masks the closeness and importance of the issue." Pet. 9. In support of this contention, Mr. Coleman points to statements by some of the circuit courts to the effect that the argument Mr. Coleman advances here (and that each of those courts rejected in unanimous decisions) is "colorable" or presents a "close question." Pet. 11. The mere use of those common appellate terms of art does not, however, signal that a question is worthy of this Court's review. The courts of appeals regularly, and capably, evaluate colorable arguments and decide close questions. When six of those courts, in

unanimous panel decisions, all resolve an issue the same way, there is no important division of authority that calls for this Court to step in and establish uniformity.

Mr. Coleman also criticizes the depth of analysis employed by these courts, by suggesting that the mounting consensus is the result of courts simply following the lead of their sister circuits or that some courts have merely adhered to their pre-*Hibbs* circuit precedent. Pet. 12-13, 14-17. Neither criticism can fairly be directed at the Fourth Circuit's decision here.

First, that court expressly declined to rely on the reasoning of its pre-*Hibbs* decision in *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001), because it recognized that "the opinion's rationale was not specific to the self-care provision" and its "analysis is no longer valid in light of *Hibbs*." Pet. App. 11 n.4. The court then went on to perform an analysis that was specific to the self-care provision and that followed the analytical framework set forth in *Hibbs*. Pet. App. 10-12.

Second, although the Fourth Circuit noted that the conclusion it had reached by applying the *Hibbs* analysis was consistent with "each of the four circuits to consider the issue," Pet. App. 13-14,[3] it is not true that the Fourth Circuit failed to conduct an

[3] The Court of Appeals omitted from its count the Eighth Circuit, a fifth court of appeals to reach the same conclusion following *Hibbs*.

"independent analysis," Pet. 13. The court announced it was joining the other circuits only after explaining the basis for its own conclusion.[4]

Finally, there is nothing remarkable or disturbing about one court finding another court's reasoning persuasive, particularly when that reasoning properly applies the "congruence and proportionality" standard this Court has prescribed for evaluating when Congress has validly abrogated the states' sovereign immunity, *see City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), and when that reasoning tracks the application of those standards by this Court in evaluating a different provision of the same statute, as it did in *Hibbs*, 538 U.S. at 728.

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[4] The court of appeals' careful analysis is "independent" in a further respect. Mr. Coleman's brief in that court devoted approximately two pages to his FMLA argument, cited only *Hibbs* as support for his position, and did not acknowledge the decisions of other courts that contradicted his assertion that "[t]here is no distinction which the lower court can cite to indicate that the self-care provision of FMLA is to be treated differently from the family-leave provision." Brief of Appellant (4th Cir. No. 09-1582) at 18.

II. The Decision Below Does Not Conflict with this Court's Precedent, the Decision Is Correct, and There Is No Need to Provide Further Guidance to Lower Courts or Litigants.

A. The Court of Appeals Analyzed the Issue Presented Here in Conformity with this Court's Precedents, and its Decision Is Correct on the Merits.

Mr. Coleman does not assert that the court of appeals decided this case in a way that directly "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Rather, he argues that this Court's holding in *Hibbs,* which was expressly limited to the question of whether the FMLA's family-care provisions validly abrogated the states' sovereign immunity, should be extended to the very different question of whether the self-care provision of the FMLA likewise subjects the states to suits for money damages. Although *Hibbs* did not address the question presented here, it did supply the analytical framework for answering that question. The court of appeals applied that analytical framework, and it did so correctly.

1. As this Court did in *Hibbs,* 538 U.S. at 726-28, the court of appeals began by reviewing the standards, established in this Court's precedents, that courts are to use in evaluating whether a congressional enactment validly abrogates the states' sovereign immunity, Pet. App. 8-9. As this Court did, 538 U.S. at 728, the court of appeals concluded that the congressional enactment would have to be shown

to address an identified constitutional violation by creating a remedy that exhibits "congruence and proportionality" under the test set forth in *City of Boerne*, 521 U.S. at 520, Pet. App. 9, 12-13. In applying that test, this Court examined the legislative record to determine whether the enactment was aimed at a constitutional violation, and, if so, whether Congress "had evidence of a pattern of violations on the part of the States in this area," *Hibbs*, 528 U.S. at 729-32; the court of appeals in this case did the same, Pet. App. 12.

This Court held in *Hibbs* that the family-leave provision addressed a valid Fourteenth Amendment objective in combating gender discrimination and that Congress had compiled a record of states engaging in that discrimination as employers. *See* 538 U.S. at 735-36. The Court further determined that the remedy chosen by Congress was an appropriate one, narrowly targeted to redress the constitutional violations that Congress had identified. *See id.* at 740. The court of appeals, applying the same analysis, found that the self-care provision was not intended to address gender discrimination and that there was no record of discrimination in public employers' practices regarding medical leave. Pet. App. 12. Accordingly, the court of appeals concluded that the self-care provision could not "pass the congruence-and-proportionality test." Pet. App. 12.

2. Although the same analysis used in *Hibbs* resulted in a different outcome in this case, both outcomes are correct. The *Hibbs* analysis yielded a

different outcome here simply because the court of appeals was analyzing a provision that differs in material respects from the one this Court analyzed in *Hibbs*. Mr. Coleman does not argue that granting unpaid leave to employees for their own medical needs furthers a valid Fourteenth Amendment objective; nor does he point to any part of the legislative record to show that the self-care provision was targeted at a constitutional violation that is examined under heightened scrutiny; nor does he argue that the court of appeals overlooked portions of the legislative record demonstrating that States discriminated against their employees in the granting of medical leave (either along gender lines or as part of a "widespread pattern" of irrational discrimination on other lines, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 90 (2000)); nor, finally, does he explain how the self-care provision would remedy any problem of discrimination.

Mr. Coleman's objection to the outcome in his case, then, is that he believes the *Hibbs* analysis should not have been undertaken at all. He is therefore "left to argue," as the court of appeals observed, that the question of abrogation can be asked only by considering the FMLA "as a whole rather than considering the self-care provision individually." Pet. App. 13. The court of appeals responded to that argument by stating, "we know of no basis for adopting such an undifferentiated analysis," Pet. App. 13,

and indeed there is no basis.[5] In *Hibbs*, this Court examined the family-care provision individually, not the FMLA as a whole. And this Court has elsewhere applied the same abrogation analysis to different parts of the same statute, while reaching different conclusions, in determining whether Title I and Title II of the Americans with Disabilities Act ("ADA") abrogate state sovereign immunity. *Compare Tennessee v. Lane*, 541 U.S. 509 (2004), *with Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *see also Lane*, 541 U.S. at 530-31 ("[N]othing in our case law requires us to consider Title II" of the ADA "as an undifferentiated whole.").

Congress should not be inhibited from including in the same statute provisions authorized by Congress's Commerce Power and provisions authorized by its power under § 5 of the Fourteenth Amendment.

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[5] The only authority cited by Mr. Coleman for the proposition that "the Constitution does not require point-by-point parsing of the legislative history to determine whether section 5 statutes are congruent and proportional," Pet. 22 n.10, is *Maitland v. University of Minnesota*, 260 F.3d 959 (8th Cir. 2001). There, the Eighth Circuit rejected the contention that, although the Eleventh Amendment does not bar Title VII sex-discrimination actions brought by women, a separate congruence-and-proportionality test must be undertaken to determine whether the Eleventh Amendment bar has been removed with respect to Title VII claims brought by men. *See* 260 F.3d at 965. The Eighth Circuit appears unwilling to extend this "anti-parsing" principle as far as Mr. Coleman urges, in view of that court's decision holding that the Eleventh Amendment bars self-care claims, but not family-care claims, under the FMLA. *See Miles*, 481 F.3d at 1107.

That is what it did here. *See* S. Rep. No. 103-3, at 16 (1993) (FMLA "is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment"); H.R. Rep. No. 103-8, pt. 1, at 29 (1993) (same). When Congress does draw on both powers for different provisions of a statute, the provision supported by the Commerce Power alone will not serve as a basis for abrogating state sovereign immunity, *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996), whereas the provision supported by § 5 of the Fourteenth Amendment will serve as a basis for abrogation, if the congruence-and-proportionality test is met. The self-care provision of the FMLA belongs in the first category, whereas the family-care provision belongs in the second. That is the outcome of the decision by the court of appeals below, and it is correct.

B. Review by this Court is Unnecessary to Remove any Confusion or Uncertainty Surrounding the Issue Presented Here.

1. Mr. Coleman's petition rests on the unfounded assertion that, "[f]ollowing *Hibbs*, confusion has developed" concerning the analysis to be applied in determining whether a particular provision of a congressional enactment serves to abrogate the states' sovereign immunity. Pet. 18. On the contrary, the unanimity among the courts of appeals demonstrates that this Court has provided adequate

guidance to direct lower courts' application of the "congruence and proportionality" test. Those courts have employed the analytical approach established by this Court's decisions in *Hibbs* and other cases involving congressional abrogation of Eleventh Amendment immunity.

Mr. Coleman points to only two cases that he claims have taken a view supporting his position, by "recogniz[ing] that if the legislative record supports abrogation generally, then it applies to the statute as a whole and does not require an explanation supporting each individual subpart." The first of these cases is the unpublished decision of the Fourth Circuit in *Montgomery v. Maryland*, 72 Fed. Appx. 17 (4th Cir. 2003) (*per curiam*). That decision lends no support to Mr. Coleman's argument. First, the court *dismissed* the FMLA claim, and the statement made as dicta, on which Mr. Coleman relies, refers only to an "FMLA claim," without even noting that it was a self-care claim.[6] Second, the court's implicit assumption that *Hibbs* resolved the scope of Congress's abrogation of Eleventh Amendment immunity for all claims under the FMLA is unaccompanied by any analysis. Finally, and most importantly, the case in which the Fourth Circuit did analyze that question and that establishes the rule of decision for cases in that circuit is *this* case, which rejected Mr. Coleman's argument.

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[6] The self-care nature of the claim can be discerned only by consulting an earlier opinion in that case. *See Montgomery v. Maryland*, 266 F.3d 334, 336 (4th Cir. 2001).

The second case that Mr. Coleman cites, to support his theory that congruence and proportionality need only be measured for one part of a Congressional enactment to support abrogation of the states' sovereign immunity for all parts of the statute, is a decision of an Iowa intermediate appellate court, *Lee v. State*, 765 N.W.2d 607 (Iowa Ct. App. 2009) (table), which also is unpublished and therefore, under that State's rules, does "not constitute controlling authority," Iowa R. App. P. 6.904(c). Moreover, as Mr. Coleman acknowledges, that case is now pending on appeal before the Iowa Supreme Court. Pet. 22 n.9. If Iowa's highest court departs from the consensus of the federal courts of appeals, that case may be a candidate for review by this Court. *See* Sup. Ct. Rule 10(b). This case is not.

2. Mr. Coleman perceives confusion not only in the lower courts, but in what he describes as the "conflicting positions taken by the United States on this issue." Pet. 23. Mr. Coleman's perception in this regard, too, is mistaken.

As an initial matter, this Court's role is to review lower-court judgments, not to straighten out inconsistent positions taken by a litigant, even one as important as the United States; the responsibility to ensure uniformity in the federal government's litigation positions is an Executive Branch function. Moreover, there is no basis for suggesting that the United States' performance of that function has lacked either direction or consistency. Indeed, the United States has been thoroughly consistent in its position on the scope of abrogation effected by Congress's enactment

of the FMLA since this Court's decision in *Hibbs*, and even before.

Since 2001, the position of the United States on the question presented in the petition has been consistent not only with this Court's subsequent analysis in *Hibbs*, but also with the unanimous view of the courts of appeals that have considered the issue after *Hibbs*, and – most importantly – with the holdings of both lower courts in this case. The steadfast position of the United States is that Congress abrogated Eleventh Amendment immunity with respect to claims that are made under the family and parental leave provisions of the FMLA, but that Congress did not abrogate the States' immunity with respect to claims, like Mr. Coleman's, that are made under the self-care leave provision of the FMLA.

As Mr. Coleman acknowledges, Pet. 26-27, the Solicitor General informed Congress in 2001 that, in light of this Court's decision in *Garrett* earlier that year, the United States had "no sound basis to continue defending the abrogation of Eleventh Amendment immunity in . . . medical-leave cases" under the FMLA. Pet. App. 23. The Solicitor General's letter explained that the United States viewed Congress's objective in enacting the self-care provision to be "protecting against discrimination on the basis of temporary disability," and that it viewed the pursuit of that objective as "an appropriate exercise of Congress's Commerce Clause Power." Pet. App. 22-23. The letter emphasized, however, that the government would continue to defend abrogation of Eleventh

Amendment immunity with respect to the family-care provisions, because Congress's enactment of those provisions was an appropriate exercise of its powers under § 5 of the Fourteenth Amendment. Pet. App. 23.

The United States adhered to this view before this Court in *Hibbs* five months later. In its brief in opposition, the United States explained that the apparent division of authority in the lower courts concerning whether the FMLA validly abrogates state sovereign immunity was largely explained by the fact that some cases involved the self-care provision while others, including the *Hibbs* case, involved the family-care provisions. Brief for the United States in Opposition (No. 01-1368) (May 2002), at 7-8. As the United States emphasized then, "the difference matters." *Id.* at 8. The United States explained that the question of Congress's authority to enact the family medical leave provision and the sick leave provision *present distinct constitutional questions, the analysis of which should not be intertwined.*" *Id.* at 10 n.3 (emphasis added).

In its brief on the merits in *Hibbs,* the United States continued to observe this distinction between the family-care and self-care provisions of the FMLA. Throughout the brief, the United States confined its arguments in defense of abrogation to the family-care provision, *see* Brief for the United States (No. 01-1368) (Oct. 2002), just as this Court confined its analysis to that provision when it decided *Hibbs*.

Mr. Coleman's suggestion that "*Hibbs* represents a change in circumstances substantial enough to warrant a policy review by the United States," Pet. 27, is perplexing, because in *Hibbs* this Court *vindicated* the policy position advanced by the United States. The only evidence Mr. Coleman can muster to support his claim that "the United States has taken inconsistent positions on the issue," Pet. 25, consists of two briefs the government filed in lower courts before *Hibbs*: the first was filed in March 2001, before the Solicitor General's December 2001 letter to Congress, and the second was filed in a case involving the family-care provision (although Mr. Coleman states that "much of the government's brief was non-specific"). Pet. 25-26. Thus, there is no support for the suggestion that the United States is uncertain of its position on this issue. Since *Hibbs*, the government has not veered from the position announced by the Solicitor General in December 2001: it is appropriate to analyze the self-care and family-care provisions as separate and distinct for purposes of determining whether Congress validly abrogated the states' sovereign immunity from suits for money damages. That is precisely the approach taken by the court of appeals in this case, and it did so correctly.

III. This Case Provides a Poor Vehicle for *Certiorari* Review.

Even if the question presented by the petition were otherwise worthy of this Court's discretionary

review, this case is not a suitable vehicle for that review.

First, unlike this case, another case might present itself on appeal with a more fully developed factual record and provide context that would aid the Court's consideration of the legal issues presented. Mr. Coleman's claim did not proceed past the respondents' successful invocation of sovereign immunity at the pleading stage. Consequently, the factual record is limited to the untested allegations made in Mr. Coleman's complaint (which, with respect to the FMLA claim at issue here, consists principally of five spare factual averments). That factual deficit should not exist in all, or even most, cases involving an alleged violation of the self-care provision of the FMLA. Mr. Coleman did not pursue injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), which creates an exception to the doctrine of Eleventh Amendment immunity for injunctive-relief claims against state officials.

Unlike Mr. Coleman, other plaintiffs will seek money damages while simultaneously invoking the *Ex parte Young* exception to pursue injunctive relief. *See, e.g., Nelson*, 535 F.3d at 321, 324 (noting Eleventh Amendment bar to self-care claim against official in his official capacity, but authorizing injunctive claim for reinstatement under *Ex parte Young*). In a case seeking injunctive relief under this theory, if the self-care claim is meritorious, the case will proceed past the pleading stage to summary judgment or trial. Thus, even if, as Mr. Coleman predicts, Pet. 17,

the courts continue to decide the question presented here as the lower courts in this case did, the merits of other litigants' claims will be decided on a factual record.

A second factor militating against review is that, even if this Court resolved the question presented by Mr. Coleman's petition in his favor, it would afford him no relief. The futility of his appeal in this action is foreordained, because he brought the same FMLA self-care claim against the respondents in State court, where it was dismissed on the merits with prejudice. Mr. Coleman did not appeal from that judgment, which was entered before the federal district court had ruled on the respondent's pending motion to dismiss the claims in that court. As a result, Mr. Coleman's attempt to obtain review by this Court will avail him nothing.

A ruling by this Court in Mr. Coleman's favor on the merits would result in a remand to the district court. That court would be required to "give the same preclusive effect to [the] state-court judgment" against Mr. Coleman that a Maryland court would give. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005) (quoting *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986)). Under the Maryland *res judicata* principles that would apply, Mr. Coleman's claim would be barred, *see Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 161-62 (4th Cir. 2008) (citing *Anne Arundel*

County Bd. of Educ. v. Norville, 390 Md. 93, 107-08 (2005)).[7] Thus, a decision by this Court reversing the lower courts' rulings would not alter the legal relationship between the parties. In other words, Mr. Coleman's petition asks this Court to revive a claim that is long past the point of resuscitation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 31, 2011

[7] Because the respondents' Rule 12(b) motion was successful, they were not required to file an answer to the complaint. *See* Fed. R. Civ. P. 12(a)(4). Had the motion been denied, the respondents would have been able to assert in their answer a claim-preclusion defense based on the state-court judgment that had been entered while the federal-court motion was pending. *See* Fed. R. Civ. P. 8(c)(1) (listing *res judicata* as defense to be raised in answer).

REPLY BRIEF

RECORD AND BRIEFS

No. 10-1016

Supreme Court, U.S.
FILED
JUN 3 - 2011
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In The Supreme Court of the United States

DANIEL COLEMAN,

Petitioner,

v.

MARYLAND COURT OF APPEALS; FRANK BROCCOLINA, STATE COURT ADMINISTRATOR; LARRY JONES, CONTRACT ADMINISTRATOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Brief of the United States as Intervenor-Appellant, *Bylsma v. Freeman*, No. 01-16102 AA, 2002 WL 32366215 4

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George C. Pratt, *Moore's Federal Practice – Civil*, Vol. 19, § 205.05 (2011) 10

Supplemental Brief of Intervenor United States of America, *Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001) (No. 00-1581), 2001 WL 36019418 ..... 3, 4

I. WHEN THE LOWER COURT HAS TAKEN THE GRAVE STEP OF DECLARING AN ACT OF CONGRESS UNCONSTITUTIONAL REVIEW BY THE COURT IS APPROPRIATE.

The State of Maryland's Brief in Opposition[1] ignores a core basis for Mr. Coleman's request that this Court grant review. The United States Court of Appeals for the Fourth Circuit has declared an act of Congress unconstitutional. The Court appropriately grants certiorari when "a United States Court of Appeals has decided an important question of federal law that has not been settled, but should be, by this Court."[2] This is particularly true when a court of appeals has taken the extraordinary step of declaring an act of Congress unconstitutional,[3] or as the Court framed it in *United States v. Gainey*, 380 U.S. 63 (1965) – "to review the exercise of the *grave* power of annulling an Act of Congress." *Id.* at 65 (*emphasis added*).

It is appropriate that the Court grant review in these situations because doing so respects the

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[1] The State of Maryland's Brief in Opposition to Petition for Writ of Certiorari will be referenced as "Br. Opp. at ___", the Petition for Writ of Certiorari will be referenced as "Pet. at ___."

[2] Sup. Ct. R. 10(c)

[3] *See United States v. Butler*, 297 U.S. 1 (1936) (standing for the general proposition that the Court will review a lower court decision when the lower court has declared an act of Congress unconstitutional).

separation of powers envisioned by our Constitution. The United States recently made this point in its defense of the Affordable Health Care Act. "The Supreme Court has repeatedly stressed that courts must accord great deference to the regulatory means Congress selects to accomplish its legitimate regulatory objectives. That deference reflects the constitutional authority and institutional capacity of the political branches to make such operational choices."[4] The constitutional challenges to the Affordable Health Care Act involve Congress' power to regulate commerce and Congress' power to tax, while here the issue is Congress' power to regulate under Section 5 of the Fourteenth Amendment. However both present the same fundamental issue: the degree of deference courts should accord the regulatory means Congress has selected to address significant issues presented in society. When, as here, the lower court has ruled that Congress has exceeded its authority, review by the Court is warranted.[5]

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[4] Brief of the United States in *Commonwealth of Virginia v. Sebelius* at page 19., United States Court of Appeals for the Fourth Circuit, Nos. 11-1057 & 11-1058 (filed February 28, 2011 by Acting Solicitor General Neal Kumar Katyal).

[5] Other examples where the Court has granted certiorari when a lower court has invalidated an act of Congress include *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), where the Court explained "[b]ecause the court below decided a federal statute unconstitutional and applied reasoning that was questionable under our cases relating to the regulation of commercial speech, we granted certiorari." *Id.* at 425. Similarly in *United States v. Bajakajian*, 524 U.S. 321 (1998), the Court

(Continued on following page)

Additionally, the State has also muddled a related issue in its Opposition – the issue that certiorari should be granted to clarify the United States' position on the self-care provision of the Family Medical Leave Act ("FMLA"). The State argues that it is not the role of the Court to "straighten out inconsistent positions taken by a litigant, even one as important as the United States." Br. Opp. at 17. However, it is the Court's role, as discussed supra at pages 1-2, to make the final determination when an appellate court has ruled that an act of Congress is unconstitutional.

Contrary to the State's contention, (Br. Opp. at 17-20), the United States has taken conflicting positions on the issue. Pet. at 25-28. The United States defended the constitutionality of the self-care provision in the face of *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), arguing that the provision not only served as an appropriate response to disability-based discrimination, but that it also was enacted to prevent gender discrimination against both men and women. Supplemental Brief of Intervenor United States of America, *Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001) (No. 00-1581), 2001 WL 36019418. *See* Pet. at 25. The United States stressed: "*Garrett* did not alter the relevant inquiry for determining whether Congress has acted within

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heard the case "[b]ecause the Court of Appeals . . . invalidated a portion of an act of Congress." *Id.* at 327.

the scope of its Fourteenth Amendment power . . . [Congress'] attempt to remedy employment practices based on gender stereotypes falls within its Fourteenth Amendment powers." *Id.* The United States made similar arguments in *Bylsma v. Freeman*, 346 F.3d 1324 (11th Cir. 2003). *See* Brief of the United States as Intervenor-Appellant, *Bylsma v. Freeman*, No. 01-16102 AA, 2002 WL 32366215. Pet. at 25-26.[6]

At the time of briefing in *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), the Office of the Solicitor General changed directions filing a Brief in Opposition, stating that it was "notifying Congress of [the Solicitor General's] decision to decline further defense of the abrogation of Eleventh Amendment immunity for claims brought under 29 U.S.C. 2612(a)(1)(D)." Brief for the United States in Opposition, *Nev. Dep't of Human Res. v. Hibbs*, No. 01-1368, 2002 WL 32135355, at *8 n.2. The Solicitor General's Office offered two reasons for the decision:

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[6] The State argues that the Petition makes no argument that granting self-care leave furthers a "valid Fourteenth Amendment objective" and that the Petition does not cite to the legislative record showing "that the self-care provision was targeted at a constitutional violation that is examined under heightened scrutiny. . . ." Br. Opp. at 13. This merits argument is inappropriate in a petition for certiorari. There is, however, significant support in the legislative record showing that the self-care provision is part of Congress' congruent and proportional response to gender discrimination in the granting of workplace leave. Some of this history is discussed in the *Laro* and *Bylsma* briefs cited above.

frustration with contrary circuit court decisions and the *Garrett* decision itself. Pet. App. 22-23. The *Hibbs* decision undermined the rationale of many of the circuit court decisions referenced by the Solicitor General. In addition, the letter indicated that the Office would hold this position absent "changed circumstances." Pet. App. 22-23.

The Court's decision in *Hibbs* upholding the constitutionality of the family leave provision presents "changed circumstances." However, the United States has not articulated its current position on the self-care provision, or whether it should reevaluate its position as a result of *Hibbs*. It is on that point that the State makes the same mistake that many of the lower courts did when they found no valid abrogation of immunity. The State and these lower court decisions base their analysis on pre-*Hibbs'* analysis and on an assumption that *Garrett* required this finding. Br. Opp. at 17-19. As noted, (Pet. at 25-27), the United States had previously argued that *Garrett* did not alter the United States' view that the self-care provision of the FMLA was constitutional.

This case presents the ideal vehicle for resolving this issue. Because the Solicitor General is not currently defending the constitutionality of the self-care provision, this Court needs to provide guidance, clarity and finality. This Court should grant certiorari to resolve the issue, or at a minimum, request that the United States clarify its position.

II. THIS ISSUE HAS BEEN SUFFICIENTLY ANALYZED BY THE LOWER COURTS TO WARRANT A FINAL DETERMINATION BY THE COURT.

The State devotes part of its Opposition (Br. Opp. at 7-10) to arguing a point that the Petition acknowledged – that the courts of appeals that have spoken on this issue have found that Congress did not validly abrogate the states' Eleventh Amendment immunity when it enacted the self-care provision of the FMLA. Pet. at 8-9. Most circuits have spoken on this issue. There is no need for further percolation in the appellate courts. Pet. at 8-17. Many of the circuits finding no valid abrogation have relied upon pre-*Hibbs* analysis, which was rejected in part in *Hibbs*. Pet. at 14-17. The other circuits have echoed the holding of several of the initial cases. Pet. at 10-17.

Brockman v. Wyoming Department of Family Services, 342 F.3d 1159 (10th Cir. 2003) was the first post-*Hibbs* case that addressed the self-care provision of the FMLA. In *Brockman*, the court did not extend *Hibbs* to the self-care provision. Notwithstanding this holding, the Tenth Circuit recognized that "there is a colorable argument to the effect that the self-care provision of the FMLA must be viewed as part of the Act as a whole, and that it would therefore be a valid abrogation of states' sovereign immunity." *Id.* at 1164. Soon after, the Seventh Circuit in *Toeller v. Wisconsin Department of Corrections*, 461 F.3d 871 (7th Cir. 2006), acknowledged that the issue presented a "close question." *Id.* at 873.

Despite both the Tenth and Seventh Circuits noting that the issue was open to debate or "close," other circuit courts have employed very little independent analysis of the issue in subsequent decisions and have often relied on pre-*Hibbs* analysis. This may have prompted Judge Bright to observe that "an argument can be made that the self-care provision of the FMLA permits a suit against the State. This issue therefore needs resolution by the Supreme Court of the United States." *McKlintic v. 36th Judicial Circuit Court*, 508 F.3d 875, 878 (8th Cir. 2007).[7]

III. THE COURT SHOULD GRANT REVIEW TO ENSURE THAT CONGRESS AND THE COURTS UNDERSTAND THE NATURE OF THE RECORD THAT MUST BE CREATED TO WAIVE ELEVENTH AMENDMENT IMMUNITY.

Another reason this Court should grant certiorari is so that it can provide Congress with guidance regarding what it must do to create a sufficient legislative record to validly waive the states' Eleventh

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[7] The State argues that there is not a current conflict which warrants resolution by the Court. However, it seems to imply that if the Iowa Supreme Court, in the possible review of the decision in *Lee v. State*, 765 N.W.2d 607 (2009) (table), would "depart [ ] from the consensus of the federal courts of appeal" on this issue then "that case may be a candidate for review by This Court." Br. Opp. at 17. It seems odd to argue that no real conflict on the issue currently exists but that one decision by a state appellate court may be sufficient to create this conflict.

Amendment immunity. Specifically, certiorari should be granted to determine whether Congress can consider subparts of a statute under one comprehensive legislative record or whether each individual subpart requires its own exhaustive legislative record. There has been confusion in the wake of *Hibbs* as some courts seem to read *Hibbs* to require a specific legislative record for each subpart. Pet. at 17-23.

In *Hibbs,* the Court noted that Congress enacted the FMLA as prophylactic Section 5 legislation to combat persistent unconstitutional gender discrimination by the states of which the Court found sufficient evidence in the legislative record. *Hibbs* at 729. Congress enacted all of the provisions in the FMLA, including the self-care provision, together as a part of the entire prophylactic scheme. The *Hibbs* Court found that the FMLA was a congruent and proportional response to the evidence of states' gender discrimination in the legislative record; it seems counterintuitive to find that the self-care provision is not part of this congruent and proportional response. *Id.* at 740.

The FMLA has been characterized as an example of a comprehensive response to gender discrimination in the granting of workplace leave, an important constitutional issue. *Id.* Congress must have the ability to effectively and efficiently enact legislation without questioning whether its methodology and legislative record will one day be found insufficient to

support all of the parts of legislation it passes.[8] This Court should clarify the question of whether, when the legislature, pursuant to powers granted under Section 5 of the Fourteenth Amendment, enacts a statute it can create one comprehensive legislative record to support all related subparts of that particular legislation, or whether it is required to create individual legislative histories for each subpart.

IV. THIS CASE IS A TIMELY AND APPROPRIATE ONE TO RESOLVE THIS IMPORTANT ISSUE.

The State also attempts to misdirect the Court by introducing an issue not raised before the District Court or the Court of Appeals. Br. Opp. at 20-22. The State claims that the Baltimore Circuit Court's dismissal of Mr. Coleman's state action may preclude consideration of his actions in federal court if this case is remanded. The State, however, waived this issue by failing to raise it in either court below.

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[8] Justice Sotomayor recently raised this very issue in analyzing a comparable issue in another federal statute. In her dissenting opinion in *Sossamon v. Texas*, 131 S.Ct. 1651 (2011) (Sotomayor, J., dissenting), Justice Sotomayor expressed concern that Congress, in an effort to secure a waiver of immunity under the majority's opinion in *Sossamon*, would be forced to "itemize in the statutory text every type of relief meant to be available against sovereign defendants." *Id.* at 670. She feared the prospect of unending challenges to "all manner of federal statutes, on the ground that Congress failed to predict that a laundry list of terms must be included to waive sovereign immunity. . . ." *Id.*

Neither the State's Motion to Dismiss in the District Court or its brief in the Fourth Circuit mentions the judgment of the Baltimore Circuit Court. Accordingly, it is not mentioned by the District Court or the Fourth Circuit. Pet. App. at 1-20.

The Supreme Court ordinarily considers only issues raised in the lower courts. *Adickes v. S.S. Kress, Inc.*, 398 U.S. 144, 147 n.2 (1970); George C. Pratt, *Moore's Federal Practice – Civil*, Vol. 19, § 205.05 (2011). The state court action was dismissed on January 13, 2009, and the United States District Court entered its order on May 7, 2009. The State had over three months to amend its motion to dismiss in the District Court to raise the preclusion issue and it failed to do so. Following the federal District Court's order, the State had another six months – until November 9, 2011 – to raise the issue before the Fourth Circuit and again, it failed to do so. To raise it now, almost two and one-half years after the state court's dismissal, shows the dilatory nature of this argument, and that it has been waived.

Moreover, because the Baltimore Circuit Court never considered the merits of Mr. Coleman's claim, there is no preclusion. An issue is precluded from separate litigation under principles of *res judicata* only if the issue was actually litigated and decided in the first action. Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, vol. 18, § 4416 (2d ed. West 2010). The Baltimore Circuit court dismissed Mr. Coleman's Complaint "for the reasons stated in the Defendants'

Memorandum," with the court noting that Mr. Coleman did not respond to Defendants' Motion to Dismiss. *Coleman v. Maryland Court of Appeals*, No. 24-C-08-005975 (D. Md. Jan. 13, 2009). With state and federal actions running concurrently, Mr. Coleman's abdication from the state proceedings, while the federal proceedings continued, did not constitute a "litigation of the issues."

If properly preserved and argued, the Eleventh Amendment provides a quasi-jurisdictional bar to federal court jurisdiction that may be first raised on appeal. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (*citing Ford Motor Company v. Department of Treasury*, 323 U.S. 459 (1945)). However, that is not the same issue as preclusion; the issue the State of Maryland seeks to raise at this late stage of the litigation. The issue of Eleventh Amendment sovereign immunity has been raised at every step of the litigation. What the State mistakenly attempts is not the introduction of the sovereign immunity defense, but the untimely introduction of a Maryland Court's judgment through *res judicata*. This has been waived by the State and has no impact upon whether the Court should grant certiorari in this case.

V. CONCLUSION

This Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fourth Circuit. Alternatively, this Court should invite the Solicitor General to file a

brief in this matter expressing the position of the United States.

Respectfully submitted this 3rd day of June, 2011.

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JOINT APPENDIX

RECORD AND BRIEFS

No. 10-1016

FILED
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In The Supreme Court of the United States

DANIEL COLEMAN

Petitioner,

v.

MARYLAND COURT OF APPEALS,
FRANK BROCCOLINA, State Court Administrator,
LARRY JONES, Contract Administrator

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed February 8, 2011
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Relevant Docket Entries For The
U.S. District Court
District of Maryland (Baltimore)

Date Filed	#	Docket Text
11/25/2008	7	AMENDED COMPLAINT against all defendants, filed by Daniel Coleman. (Smith, Edward) (Entered: 11/25/2008)

Relevant Docket Entries For The United States Court of Appeals for the Fourth Circuit

Date Filed	#	Docket Text
11/10/2010	32	JUDGMENT ORDER filed. Disposition method: 09-1582 opn.p.arg. Decision: Affirmed. Originating case number: 1:08-cv-02464-BEL, Entered on Docket Date: 11/10/2010. [998463493] Copies to all parties and the district court/agency. [09-1582] (RHS)

IN THE UNITED STATES
DISTRICT COURT OF MARYLAND
NORTHERN DIVISION

DANIEL COLEMAN
[Home Address Omitted]
Baltimore, MD 21210

Plaintiff,

v.

MARYLAND COURT OF APPEALS CIVIL NO.:
Maryland Judicial Center
580 Taylor Avenue
Annapolis, MD 21401

Serve On: Douglass Gansler
Attorney General
Office of the Attorney General
200 St. Paul Street
Baltimore, MD 21202

And

FRANK BROCCOLINA
State Court Administrator
Administrative Office of Courts
580 Taylor Avenue
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And

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Serve On: Douglass Gansler
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Defendants.

****

AMENDED COMPLAINT FOR EMPLOYMENT DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT AND STATE CLAIMS AND DEMAND FOR JURY TRIAL

(Filed Nov. 25, 2008)

Daniel Coleman, Plaintiff, by Edward Smith, Jr., his attorney alleges:

1. Plaintiff is an African-American male whose address is [Home Address Omitted], Baltimore, MD 21210.

2. Defendant is a sovereign governmental entity of the State of Maryland with its principal place of business being 580 Taylor Avenue, Annapolis, Maryland 21401.

3. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343(a)(4) and 42 U.S.C. § 2000e-5(f). This is a suit in both law and equity authorized and

instituted pursuant to Title VII of the Civil Rights Act of 1964 and 1991 as amended. Jurisdiction of this Court is invoked to secure the protection of and redress the deprivation of rights secured by 42 U.S.C. § 2000e et seq. providing for injunctive and other relief against racial discrimination in employment, and all statutory conditions precedent to this action, which have occurred.

4. At all relevant times Defendant was and is an "employer" as defined in Section 701(b) of Title VII of the Civil Rights Act of 1964 (Title VII) 42 U.S.C. § 2000e(b) as amended.

[3] 5. On or about March, 2001, Plaintiff was employed by Defendant as a Director of Procurement and Contract Administration.

6. From that date until August 3, 2007, Plaintiff was assigned by Defendant to create the Maryland Judiciary Procurement Policy. The State Court Administrator, Frank Broccolina, a white male, was Plaintiff's supervisor and had the highest level of contract approval on behalf of the Maryland Judiciary with only the Chief Judge of The Maryland Court of Appeals having oversight authority.

7. Two years after the Plaintiff was employed his title changes to Executive Director of Procurement and Contract Administration.

8. On or about Tuesday, October 18, 2005, Larry Jones, a relative of Faye Gaskins, who was Deputy State Court Administrator under Frank Broccolina,

had a confrontation with a white female employee, Joyce Shue. Jones was a member of the Procurement and Contract Administration staff. The Plaintiff investigated the matter prior to a complaint being filed in the Human Relations Department which resulted in a five (5) day suspension against Jones based upon the Maryland Judiciary Human Resources Policy. Both Gaskins and Broccolina intervened and Jones received a one (1) day suspension of eight (8) hours of leave for his behavior toward a subordinate staff member, by T. J. Reard on Manager of the Employment Relations.

9. Thereafter Jones in retaliation went to Broccolina to encourage him to investigate Plaintiff. [*Plaintiff was treated differently as* [4] *a result of his race than whites who were similarly situated by this investigation.*]

10. Jones made oral statements to Broccolina that Plaintiff was engaged in steering contracts to vendors in which he had an interest. In Jones' statements to Broccolina, he made a false allegation about Plaintiff's integrity and honest business/employment dealings, namely that he was engaged in contract manipulation, malfeasance, misfeasance and fraud.

11. Jones made these false publications to Broccolina with the knowledge that they were untrue and with the intention to cause Plaintiff to be fired.

12. Jones' purpose was malicious and deliberate. He enlisted Broccolina who had a professional relationship with his family member to conduct an

investigation. Broccolina threatened dismissal of other employees if they divulged that the investigation of the Plaintiff while knowing that the allegations were false and with the intention of maliciously helping Jones to retaliate against the Plaintiff while backing his Deputy Administrator. [*Broccolina treated Plaintiff differently as a result of his race than white employees who were similarly situated.*]

13. In the alternative, Defendants Jones and Broccolina negligently made the aforementioned false and defamatory statements about the Plaintiff.

[5] Defendant Jones acted with knowledge of the falsity of the statements and with an intent to harm Plaintiff's employment, chances for promotion when publishing these false and defamatory statements about him to Broccolina and then Broccolina in turn publishing the statements to others.

15 That Defendant Jones was not acting under the authority of his position as an employee of the Defendant MCA, but outside the scope of his employment with gross negligence, or/and malice against the Plaintiff as was Broccolina.

16. Both Jones and Broccolina acted with knowledge of the falsity of the statements and with the intent to harm Plaintiff's chances for promotion and his professional reputation when publishing these false and defamatory statements about Plaintiff.

17. As a result of the false and defamatory statements published by Jones and Broccolina, the character and reputation of Plaintiff were harmed, his standing and reputation in the procurement field and the job market were impaired and he suffered mental anguish and personal humiliation.

18. As a direct and proximate result of the false and defamatory accusations by Jones and Broccolina, eventually Plaintiff was fired and thereby suffered a loss of prospective income which he would have earned from the salary he was receiving from the judiciary.

[6] WHEREFORE, Plaintiff demands Two Hundred Thousand Dollars ($200,000.00) in compensatory damages against the Defendants and Six Hundred Thousand Dollars ($600,000.00) in punitive damages, plus interest and costs.

Respondeat Superior

19. The Plaintiff hereby incorporates by reference the allegations contained in paragraphs one through eighteen where not inconsistent.

20. That in the alternative, the acts committed by both Jones and Broccolina were within the scope of their employment with reckless disregard for the truth of their statements and intentionally.

21. The Maryland Judiciary is responsible for all of the [*illegal*] acts committed by both Jones and Broccolina within the scope of their employment.

~~WHEREFORE, Plaintiff demands judgment against Defendant for compensatory damages in the amount of Three Hundred Thousand Dollars ($300,000.00).~~

22. During the investigation by James W. Harmon appointed by Frank Broccolina of the Plaintiff it was revealed that Jones had a financial relationship with Keith Bouchelion, a vendor of The Maryland Judiciary with whom Jones conspired to make the allegations against the Plaintiff.

[7] 23. Jones facilitated payments to Bouchelion from the budget of the Judiciary which Jones had certified as a Minority Business Enterprise (MBE) vendor.

24. Broccolina instructed Plaintiff to take no action against Bouchelion who was under investigation for questionable invoicing practices. [*Broccolina himself had outside business involvements yet the defendants did* not *discipline him as a white male while firing the Plaintiff in a pre-textual manner as a result of his race.*]

25. Faye Gaskins, Plaintiff's up-line direct supervisor and Jones' family member, on or about April 4, 2007 gave a written reprimand to Plaintiff as a result of a communication protocol established between the Compliance Monitoring Unit and The Procurement and Contract Administration Department. Judge Bell ordered this protocol and the Plaintiff put it into effect. For twelve (12) months Jones had used the protocol.

26. On April 4, 2007, when Plaintiff advised Jones of this fact. Faye Gaskins interrupted and chastised Plaintiff.

27. On April 10, 2007, Gaskins gave a letter to Plaintiff as a reprimand for the events of April 4, 2007. Said reprimand was retaliatory and untrue in all respects. [*It was done as result of Plaintiff's race while others who were white did not receive such action*.]

[8] 28. Thereafter, on May 15, 2007, Plaintiff appealed Gaskins' actions to the Chief Judge based upon the Maryland Judiciary Human Resource Policy.

29. The appeal was denied on June 22, 2007.

Family Medical Leave Act

30. On August 2, 3007 Plaintiff sent a request for sick leave to Broccolina.

31. Plaintiff was placed under a doctor's care until August 13, 2007.

32. On August 2 [3], 2007, Broccolina called Plaintiff to inform him that he either could resign within thirty (30) days administrative leave or be terminated immediately.

33. Pursuant to the Family Medical Leave Act and the policy of the Maryland Judiciary Human Resources policy, I [he]requested leave based upon a documented medical condition and the protection afforded b[*by*] Federal Law.

34. The Defendants violated the FMLA by intentionally firing Plaintiff for requesting relief under the law with out excuse or justification.

35. Plaintiff has met each performance standard set by the Defendant and received all of his raises and increments during his tenure.

[9] 36. Defendants have intentionally acted to treat Plaintiff differently from white employees as a direct consequence of his race-Black. The disparate treatment herein stated has been continuing since set forth herein and is systemic, continuing institutionalized policy by the Defendant which violated Tilt VI [*Title VII*] and the State Equal Opportunity Laws found in Article 49 of the Annotated Code. The decisions and activity of Broccolina, a white male, was calculated to provide white persons with benefits denied to the Plaintiff as set forth herein.

37. Plaintiff filed a timely charge of discrimination with the appropriate state fair employment practice agency.

38. Plaintiff filed a timely written charge of race discrimination with the United States Equal Employment Opportunity Commission. (EEOC)

39. Plaintiff received a Notice of Right To Sue from the EEOC. (June 21, 2008).

40. The complaint in this matter was filed with this court within 90 days from the receipt of the Notice of Right to sue.

41. The proper venue of this action is in this court as the Defendant does business in this State and district and the acts complained of took place herein.

[10] WHEREFORE, Plaintiff, respectfully invokes the powers of this Court provided in Title VII 42 U.S.C. et seq. as amended and prays for the following:

a. Defendant be permanently enjoined from discriminating against the Plaintiff on any basis forbidden by Title VII.

b. Defendant be order to reemploy the Plaintiff into a position substantially similar to the one for which he was fired with full salary, seniority and benefits.

c. Defendant compensate, reimburse and make whole the Plaintiff for all past commissions he would have made but for the illegal conduct of the Defendant under Title VII.

d. Defendant be ordered to pay compensatory and punitive damages for its conduct as alleged herein as a jury may order.

e. The Court grants such additional equitable relief as is proper and just.

f. Plaintiff pray the Court award the costs and expenses of this action and award reasonable attorney fees as provided by Title VII 42 U.S.C. § 2000e-5(k) as amended.

Respectfully Submitted:

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FILED: November 10, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1582
(1:08-cv-02464-BEL)

DANIEL COLEMAN

Plaintiff-Appellant

v.

MARYLAND COURT OF APPEALS;
FRANK BROCCOLINA, State Court Administrator;
LARRY JONES, Contract Administrator

Defendants-Appellees

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: November 10, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1582, Daniel Coleman v. Maryland
Court of Appeals
1:08-cv-02464-BEL

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: To be timely, a petition for certiorari must be filed in the United States Supreme Court within 90 days of this Court's entry of judgment. The time does not run from issuance of the mandate. If a petition for panel or en banc rehearing is timely filed, the time runs from denial of that petition. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. (www.supremecourtus.gov)

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers are sent to counsel appointed or assigned by the Court in a separate transmission at the time judgment is entered. CJA 30 vouchers are sent to counsel in capital cases. CJA 20 vouchers are sent to counsel in criminal, post-judgment, habeas, and § 2255 cases.

Assigned counsel vouchers are sent to counsel in civil, civil rights, and agency cases. Vouchers should be completed and returned within 60 days of the later of entry of judgment, denial of a petition for rehearing, or the grant or denial of a petition for writ of certiorari. If counsel appointed or assigned by the Court did not receive a voucher, forms and instructions are available from the Court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a *Bill of Costs* within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition to identify the cases to which the petition applies and to avoid companion cases proceeding to mandate during the pendency of a petition for rehearing in the lead case. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this Court, or another Court of Appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 15 pages. Copies are not required unless requested by the Court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this Court, there is no mandate. Unless the Court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents

a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

PETITIONER'S BRIEF

RECORD AND BRIEFS

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No. 10-1016

In The
Supreme Court of the United States

DANIEL COLEMAN,

Petitioner,

v.

MARYLAND COURT OF APPEALS; FRANK BROCCOLINA, STATE COURT ADMINISTRATOR; LARRY JONES, CONTRACT ADMINISTRATOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

As the Court recognized in *Nevada Department of Human Resources v. Hibbs*, Congress passed the Family and Medical Leave Act with the intention of eliminating gender discrimination in the granting of employee leave. The question presented for review is, in light of *Hibbs*, whether Congress validly abrogated the States' Eleventh Amendment immunity when it passed the self-care provision of the Family and Medical Leave Act.

PARTIES TO THE PROCEEDING

All parties to this action are set forth in the caption.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1-14) is reported at 626 F.3d 187 (4th Cir. 2010). The district court order granting Maryland Court of Appeals' Motion to Dismiss Plaintiff's Amended Complaint (Pet. App. 15-20) is unreported.[1]

JURISDICTION

The judgment of the Fourth Circuit was entered on November 10, 2010. The petition for writ of certiorari was filed on February 8, 2011 and was granted on June 27, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens

[1] Citations to the "J.A." refer to the Joint Appendix. Citations to the "Pet. App." refer to the appendix of the petition for certiorari.

> of another State, or by Citizens or Subjects of any Foreign State."

The Fourteenth Amendment provides, in pertinent part:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." . . . Section 5 gives "Congress [the] power to enforce, by appropriate legislation, the provisions of this article."

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. provides employees up to twelve weeks of unpaid leave for medical reasons or other qualifying exigencies. The pertinent provisions provide:

2611. Definitions

* * *

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed –

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

* * *

(4) Employer

(A) In general

The term "employer"

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

* * *

(iii) includes any "public agency," as defined in section 203(B) of this title; and

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

* * *

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

* * *

2612. Leave requirement.

(1) Entitlement to leave

Subject to Section 103 [29 U.S.C. § 2613] of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

The entire text of the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq., has been reproduced in the appendix to this brief.

STATEMENT OF THE CASE

I. Overview

On November 10, 2010, the United States Court of Appeals for the Fourth Circuit held that the self-care provision of the Family and Medical Leave Act of 1993 ("FMLA") does not validly abrogate the States' Eleventh Amendment immunity. Congress intended to use its Section 5 Fourteenth Amendment power when it enacted the FMLA. That power, often recognized as the zenith of Congressional authority, can be used to enact provisions necessary to carry into force the other provisions of the Fourteenth Amendment. In the FMLA, Congress explicitly stated that it was acting pursuant to the Equal Protection Clause of the Fourteenth Amendment to "minimize[ ] the potential for employment discrimination on the basis of sex by ensuring that leave is available for eligible health reasons (including maternity-related disability) . . . on a gender-neutral basis; and to promote the goal of equal opportunity for women and men." 29 U.S.C. § 2601(b)(4)-(5) (2006).

A. Petitioner Coleman's Termination and FMLA Claim

1. Petitioner Coleman's FMLA Claim

Daniel Coleman challenged his termination in federal court; he alleged that the State of Maryland discriminated against him on the basis of race in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a) (2006)), unlawfully retaliated against him, also in violation of Title VII (§ 2000e-3(a)), and refused to allow Mr. Coleman self-care leave in violation of the FMLA (29 U.S.C. § 2612(a)(1)(D) (2006)). (Pet. App. 5-6, 15-16, J.A. 10-12). The District Court granted the Maryland Court of Appeals' motion to dismiss the Title VII claims for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). (Pet. App. 16). The District Court also dismissed Mr. Coleman's FMLA claim on a Rule 12(b)(1) motion, holding that the FMLA's self-care provision was not a valid abrogation of the States' Eleventh Amendment immunity. (Pet. App. 16-20).

The only issue before this Court involves Petitioner's FMLA claim. The District Court dismissed this claim before discovery and before the parties had any opportunity for factual development. As a result, the factual record is minimal. The limited record shows that on August 2, 2007, Mr. Coleman sent his supervisor, Frank Broccolina, a request for sick leave. (J.A. 10, Pet. App. 3, 16). At that time, Mr. Coleman was placed under doctor's care for ten days to recover

from a documented illness. (J.A. 10, Pet. App. 3). This illness appears to have been a "serious health condition" as it is defined by the FMLA. Mr. Broccolina denied Mr. Coleman's request and issued him an ultimatum: resign with thirty days' leave, or be terminated immediately. (J.A. 10, Pet. App. 3, 17). Mr. Coleman alleges that he was fired immediately upon his refusal to resign. (Pet. App. 3, 15).

2. Daniel Coleman's Employment and Termination

Mr. Coleman was employed by the Maryland Court of Appeals for six years and served as the executive director of procurement and contract administration for four of those six years. (J.A. 5). Mr. Broccolina and Faye Gaskins were his supervisors. *Id.* During his employment with the Maryland Court of Appeals, Mr. Coleman satisfied all performance standards and received every incremental raise to which he was entitled. (J.A. 11, Pet. App. 3).

In October of 2005, Mr. Coleman investigated a matter involving Larry Jones, who was a member of Mr. Coleman's staff and a relative of Ms. Gaskins. (J.A. 6, Pet. App. 3). The investigation resulted in a five-day suspension for Mr. Jones; however, once Mr. Broccolina and Ms. Gaskins intervened, the suspension was reduced to one day. *Id.* As a result of his investigation, Mr. Coleman received a letter of reprimand from Ms. Gaskins regarding a "communication protocol." (J.A. 9-10, Pet. App. 3). Mr. Coleman tried

to appeal the reprimand but was unsuccessful. *Id.* Mr. Coleman believed this treatment was based upon his race. (J.A. 10, Pet. App. 3-4, 16).

As noted above, on August 2, 2007, Mr. Coleman sent his supervisor a request for leave. Mr. Coleman's request was denied and he was terminated the following day. (J.A. 10, Pet. App. 3, 15-17).

3. Proceedings Below

The District Court dismissed Mr. Coleman's FMLA claim, holding that the FMLA's self-care provision did not validly abrogate the States' Eleventh Amendment immunity. (Pet. App. 16-18). The Fourth Circuit affirmed the District Court's ruling. (Pet. App. 8-14). The Fourth Circuit referenced the Court's analysis in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) but believed that the Court's focus on the gender-related nature of the FMLA's family-care provision did not impact the validity of the self-care provision. (Pet. App. 10-11). The court reasoned that the *Hibbs* analysis of the family-care provision did not support a valid abrogation of the States' Eleventh Amendment immunity for the FMLA's self-care provision, 29 U.S.C. § 2612(a)(1)(D) (2006). (Pet. App. 11). Recognizing that the Fourth Circuit's pre-*Hibbs* ruling – that Congress had exceeded its powers in applying the FMLA to the States – was no longer valid, the Fourth Circuit still insisted that the FMLA's legislative history showed that gender discrimination was not a

motivating factor for enacting the self-care provision. (Pet. App. 11 n.4).

SUMMARY OF THE ARGUMENT

The Family and Medical Leave Act, passed pursuant to Congress' comprehensive powers under Section 5 of the Fourteenth Amendment, validly abrogates the states' immunity from suits by citizens seeking monetary relief from the states. Congress enacted the FMLA to assure both private and public employees equal access to workplace leave regardless of their sex. The FMLA makes plain what its legislative history demonstrates: that Congress carefully crafted the leave provisions of the Act as a remedy for sex discrimination on the job.

As the Court recently held in *Hibbs*, Congress unambiguously intended to abrogate the States' Eleventh Amendment immunity when it passed the family-care provision of the FMLA. That intent, combined with historic sex discrimination and the legislative record of the FMLA, demonstrate that Congress meant to target gender discrimination in the granting of family-care leave by private and state employers. This rationale applies with equal force to the self-care provision of the FMLA.

Congress recognized that the nation has an extensive history of sex discrimination in employment. The self-care provision directly responds to sex discrimination by preventing employers from

discriminating against women. The self-care provision provides gender-neutral access to leave to employees with serious medical conditions, including, but not limited to, pregnancy-related disabilities. Additionally, the legislative history of the FMLA, which spans eight years, five Congressional sessions and two Presidential vetoes, demonstrates that the four original provisions, including the self-care provision, are an integrated response to gender discrimination. The self-care provision responds directly to outdated stereotypes regarding what roles men and women are to play in society. At the same time, the self-care provision helps to avoid putting women at a disadvantage in the job market due to a perception that, if hired, they would be the only ones taking leave under the FMLA.

The FMLA as a whole is greater than the sum of its component parts. None of the four varieties of leave provided in the FMLA could accomplish Congress' purpose without the other three. The interrelated provisions of the FMLA must not be wrenched apart. Just as a table loses structural integrity when one of its four legs is sawed off, so too does the FMLA fail if one of the four original leave provisions is severed.

Finally, the FMLA with the self-care provision is both a congruent and a proportional response to the harm Congress sought to remedy. In light of the country's regrettable history of sex discrimination, the self-care provision, as well as the entire FMLA, is a targeted response to gender discrimination and is

constitutional. The lower courts that have held differently have relied on rationale rejected by *Hibbs*, therefore they can provide no guidance to the Court. Similarly, the Fourth Circuit's decision disregards Congress' express intent, undermines the notion that Congress was acting at the height of its power in order to address the intractable problem of sex discrimination in employment, and ignores the Court's analysis in *Hibbs*.

This Court should find that the self-care provision is a valid abrogation of the States' Eleventh Amendment immunity and reverse the Fourth Circuit's decision.

ARGUMENT

I. Congress Acted Within Its Expansive Powers Under Section 5 Of The Fourteenth Amendment In Passing The FMLA As A Targeted Response To Gender Discrimination.

A. Introduction

Following almost a decade of analysis and discussion, Congress passed the Family and Medical Leave Act as a targeted response to gender-based discrimination in the granting of family care and medical leave to both public and private employees. As Chief Justice Rehnquist explained, "[t]he FMLA aims to protect the right to be free from gender based discrimination in the workplace." *Hibbs*, 538 U.S. at 728. In recognizing that Congress acted in a manner

consistent with its broad powers under the Fourteenth Amendment, the Court found that Congress had properly exercised its power when enacting the family-care provision of the FMLA and had validly abrogated the States' Eleventh Amendment immunity. *Id.* at 740. The Court supported its holding by explaining that Congress had enacted the FMLA to remedy our country's regrettable history of sex discrimination in the workplace,[2] and it did so pursuant to its broad powers under Section 5 of the Fourteenth Amendment. *Id.* at 726-27. The Court also noted that the legislative record further buttressed the fact that the FMLA was designed to address gender discrimination in employment. *Id.* at 730-35.

Congress' considered deliberations of the FMLA and its predecessor statutes included debates over a multitude of options as to how to best address the issue of sex discrimination in the granting of employment leave. Ultimately, Congress concluded that

---

[2] The FMLA was also enacted, in part, pursuant to the Commerce Clause. H.R. REP. NO. 103-8, pt. 1, at 32 (1993) (indicating that "[the FMLA] is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment"); 29 U.S.C. 2611(4)(A)(i); *see also Hibbs*, 538 U.S. at 726. In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996), the Court held that Congress cannot abrogate the states' immunity through its Title I Commerce Clause authority. In this case, the sole issue presented is whether, pursuant to the Fourteenth Amendment, Congress validly abrogated the States' Eleventh Amendment immunity in suits against the states seeking monetary relief.

a four-pronged response would be appropriate. Congress provided that,

> an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. (B) Because of the placement of a son or daughter with the employee for adoption or foster care. (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition. (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(A)-(D) (2006).

Much like the four legs of a table, each of the FMLA's four family and medical leave provisions is essential to achieving Congress' intent to eliminate gender discrimination in the granting of employee leave. The self-care provision is an integral part of Congress' response. Of course, a table could stand with only three legs; but the effectiveness, stability, and strength of that table would be compromised without the support of the fourth leg. Similarly, if Congress' response to gender discrimination is deprived of one of these crucial legs – the self-care provision – the effectiveness of the FMLA in addressing gender discrimination will be greatly diminished.

The FMLA entitles a limited group of eligible employees to take unpaid leave in situations that place significant stress on families. Such situations particularly affect single-parent households, which predominantly are led by single mothers.[3] Congress sought to remedy gender inequality in the granting of workplace leave and to respond to the sex-based stereotypes driving some of these gender inequalities. These stereotypical perceptions included the beliefs that women were "destined solely for the home and the rearing of family," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), and that the role of men was "not that of homemaker but rather that of the family breadwinner." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 n.20 (1975).

Congress had the foresight to see a potential negative repercussion of legislation that would either provide leave only to women or leave that would be perceived by employers as leave that only women would take. Because of "traditional" gender stereotypes, employers would anticipate that women would take more leave than men in order to take care of their family members. Accordingly, employers could find it more expedient to simply hire a man for the

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[3] The U.S. Census Bureau released a report in 2009 finding that 82.6% of custodial parents are mothers. U.S. Census Bureau, *Custodial Mothers and Fathers and Their Child Support: 2007*, 2 (2009) *available at* http://www.census.gov/prod/2009pubs/p60-237.pdf. In 1993, the year the FMLA was passed, 84% of custodial parents were mothers. *Id.* at 3.

job and avoid having to grant women family or medical leave.[4] By enacting the FMLA's crucial fourth leg, the self-care provision, Congress addressed this possible negative repercussion and directly responded to sex discrimination and sex-based stereotyping in the granting of leave.

The FMLA originally specified four different events that would entitle an individual to up to 12 weeks of unpaid leave from work: the birth of a child, the adoption of a child, the illness of a family member, or serious illness of the employee necessitating time to care for himself or herself. 29 U.S.C. § 2612 (2006). Congress later amended the FMLA to include protections for family members of those in the armed services to take leave when the servicemember is called into active duty, creating any "qualifying exigency." 29 U.S.C. § 2612(E).

Leaving aside subsection (E), which was not added to the FMLA until 2008, the original four prongs of the FMLA were designed as an integrated response to gender discrimination; they ensured that a man and a woman would have leave equally available if he or she needed to care for his or her family or for himself or herself. Indeed, the title of the FMLA, "The Family and Medical Leave Act," denotes an

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[4] *See* H.R. REP. NO. 103-8, pt. 2, at 9 (1993) (explaining that self-care was made gender neutral so employers would not have an incentive to hire men over women). A more detailed discussion can be found *infra* at pages 43-51.

intention to provide leave not only to care for a member of the family, but also to care for oneself, should the need arise.

B. The FMLA, Including The Self-care Provision, Validly Abrogates The State's Eleventh Amendment Immunity.

Congress provided that when a state violates the provisions of the FMLA, that state can be held liable for damages. 29 U.S.C. § 2617(2) (2006). While states usually would be immune from suits seeking monetary relief, state employees may sue for damages when Congress validly abrogates the States' Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Congress validly abrogates immunity only if the statutory language shows Congress' clear intent to abrogate Eleventh Amendment immunity and Congress acts pursuant to a requisite Constitutional power granting such authority. *Seminole*, 517 U.S. at 44. As the Court explained in *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'" *Garrett*, 531 U.S. at 363 (quoting *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 73 (2000)). Later, in *Hibbs*, the Court reiterated that "Congress may . . . abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its

power under § 5 of the Fourteenth Amendment." 538 U.S. at 726.

C. Congress Unambiguously Expressed Its Intent To Abrogate The States' Eleventh Amendment Immunity In The FMLA.

The statute provides a right of action against employers who violate the FMLA (29 U.S.C. § 2617(2)), and it explicitly includes public agencies within the definition of employer. 29 U.S.C. § 2611(4)(A). In doing so, Congress authorized suits against public agencies for money damages for violations of the FMLA. In analyzing the family-care provision of the FMLA, the Court in *Hibbs* found that the FMLA's statutory language met the clear intent standard for abrogating Eleventh Amendment immunity. 538 U.S. at 726. The Court explained that "the clarity of Congress' intent . . . is not fairly debatable." *Id.* at 726. In his dissent, Justice Kennedy likewise observed that Congress' intent to abrogate the States' Eleventh Amendment immunity in the FMLA was clear. *Id.* at 744.

In several prior cases, the Court interpreted similar language under other statutes to be an unmistakable expression of Congress' intent to abrogate Eleventh Amendment immunity. For example, the language of the FMLA is similar to the Age Discrimination in Employment Act of 1967 ("ADEA"), which was found to be a clear indication of Congress' intent to abrogate immunity. *Id.* at 726; *Kimel v. Florida Bd.*

of Regents, 528 U.S. 62, 73 (2000). The ADEA, like the FMLA, also specifically identifies public agencies as falling under the right of action in the statute. 29 U.S.C. § 630(b) (2006). Like the Court in *Kimel* and *Hibbs*, this Court should find that Congress "unequivocally" expressed its intent to abrogate Eleventh Amendment immunity by enacting the FMLA.

D. Under Section 5, Congress' Powers Are Broad, And Congress Intended To Act Pursuant To Those Powers.

Eleventh Amendment immunity is not absolute. *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1991) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). Since 1879, the Court has held that the Fourteenth Amendment limits the sovereign immunity of the states. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) (citing *Ex parte Virginia*, 100 U.S. 339, 345 (1879)). Section 5 gives Congress "power to enforce, by appropriate legislation, the provisions" of the Amendment, including "the equal protection of the laws" afforded by Section 1 of the Amendment, which no state may deny to any person. U.S. Const. amend. XIV. Congress has "a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989).

So important and fundamental are the rights guaranteed by the Fourteenth Amendment that the

Amendment grants Congress "unique" powers to abrogate Eleventh Amendment immunity in order to protect those rights. *Croson*, 488 U.S. at 487-88. Of course, this unique power does not entitle Congress to substantively add to or alter the rights guaranteed by the Fourteenth Amendment; rather, Congress is charged with "enforcing" those rights, as stated in the Constitution. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Accordingly, the Fourteenth Amendment gives Congress "the authority both to remedy and to deter violation of rights" that are protected therein. *Kimel*, 528 U.S. at 81.

In order to effectuate these constitutional mandates, Congress may prohibit a "broad[] swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81; *see also Hibbs*, 538 U.S. at 727; *Garrett*, 531 U.S. at 365. Through this broad power, Congress can investigate violations, identify their suspected causes, and assess proposals both to remedy past harm and to discourage future violations.[5] This enforcement power authorizes Congress to enact legislation that is preventive or "prophylactic" with regard to possible violations of Equal Protection rights. "Congress may,

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[5] *See* H.R. REP. No. 103-8, pt. 1 (1993). In pursuit of passing the FMLA, Congress investigated violations at the state level, had experts explain causes, and then created the FMLA to remedy these past harms and discourage future violations. *See also Garrett*, 531 U.S. at 365 (observing that Congress can remedy and deter under Section 5 of the Fourteenth Amendment).

in the exercise of its § 5 power, do more than simply proscribe conduct . . . held unconstitutional" by the courts in the past. *Hibbs* 538 U.S. at 727. *See also id.* at 756 (Kennedy, J., dissenting) ("[F]ederal legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.") (internal quotations omitted)). Unlike the courts, the legislature may also act without the presentation of a case or controversy, providing an opportunity to construct valuable prophylaxis without awaiting a controversy involving injury to such valuable rights.

The FMLA's self-care provision is valid Section 5 legislation that was enacted as a response to sex discrimination in the granting of workplace leave. By enacting the FMLA, Congress did not create new rights. Rather, Congress created a defensive barrier to ensure the equal protection of the law that the Constitution guarantees to all people. Congress has authority to impose requirements beyond what the Constitution mandates when Congress intends to surround fundamental rights with an extra layer of protection. *See Hibbs* at 727-28 ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

One of the extra layers Congress may provide is allowing suits against states that would be "constitutionally impermissible in other contexts." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Congress has this

broad authority to abrogate the states' immunity only in the areas of suspect classification discrimination such as gender and race. By contrast, the Court has held that Congress' power to abrogate the states' sovereign immunity is more constrained when the allegations are that the states engaged in discrimination based upon non-suspect classifications like age or disability. *Kimel,* 528 U.S. at 62.

In this instance, Congress was legislating against a national background of gender discrimination. Congress investigated and found that the states were continually violating the Fourteenth Amendment by discriminating against individuals because of their gender. In such a circumstance, remedial and prophylactic legislation under Section 5 is proper. *See Hibbs*, 538 U.S. at 735.

E. Congress Acted Pursuant To This Broad Remedial Power When Enacting The FMLA.

The FMLA expressly frames its purpose with reference to the Equal Protection Clause. The Act aims "to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] [C]lause." 29 U.S.C. § 2601(b)(5) (2006). Preventing gender discrimination is one of the "core promises" of the Fourteenth Amendment. *See Wilson-Jones v. Caviness*, 99 F.3d 203, 209 (6th Cir. 1996). "Analysis may appropriately begin with the reminder that *Reed* emphasized that statutory

classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'" *Craig v. Boren*, 429 U.S. 190, 197 (1976) (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

The statute is designed to support family life and to provide reasonable leave for workers "in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons . . . and for compelling family reasons, on a gender-neutral basis." 29 U.S.C. § 2601(b)(4) (2006). The Act aimed to "promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection] [C]lause." § 2601(b)(5). When debating this issue, the Senate noted that it is fundamentally "unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working." S. REP. No. 103-3, at 11 (1993). It is even more unfair when one sex bears this burden because of the societal stereotypes regarding the roles each sex is to fulfill. Congress wanted to eliminate this problem and achieve gender equality by enacting the FMLA.

Hibbs confirmed that Congress validly exercised its powers under the Fourteenth Amendment when it enacted the family-care provision of the FMLA. *Hibbs*, 538 U.S. at 726. In *Hibbs*, the Supreme Court found that Congress acted in response to, among other things, gender discrimination in enacting the

family-care provision of the FMLA. As Chief Justice Rehnquist, writing for the majority, explained:

> By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

Hibbs, 538 U.S. at 737.

Similarly, by including the self-care provision, Congress provided across-the-board access to leave that is available to both men and women for any serious medical condition. The self-care provision is not a stand-alone provision directed toward combating disability discrimination.[6] Instead, Congress included the provision because "employment standards that apply to one gender only have serious potential for

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[6] The self-care provision does involve leave for disability, but the major evil Congress attempted to combat was gender discrimination in the granting of medical leave.

encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. § 2601(a)(6) (2006). More specifically, because employers may be less inclined to hire a woman due to anticipation of pregnancy-related complications or gender-specific medical conditions, the self-care provision allows for "leave [to be] available for eligible medical reasons on a gender-neutral basis." § 2601(b)(4).

The language and the legislative record of the FMLA make it clear that Congress, in enacting the self-care provision, intended to prevent gender discrimination in the granting of employment leave. The Court in *Hibbs* acknowledged this in finding the FMLA was a response to gender discrimination. Because the self-care provision is an integral part of Congress' carefully tailored statutory scheme, it should be viewed as part of the interrelated response to gender discrimination.

II. The Nation's History Of Unconstitutional Gender Discrimination, Combined With The Congressional Record, Is A Sufficient Factual Basis For Congress To Abrogate Eleventh Amendment Immunity.

A. The Nation, Including The States, Have A Long History Of Unconstitutional Sex Discrimination, Which Persists.

As the Court has explained, the "propriety of any § 5 legislation 'must be judged with reference to the

historical experience . . . it reflects.'" *Florida Prepaid*, 527 U.S. at 640 (citing *Boerne*, 521 U.S. at 525). This nation's "long and unfortunate history of sex discrimination" cannot be denied. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973). As the Court has repeatedly recognized, erroneous notions about the roles of women have resulted in gender stereotypes that characterize women as being "destined solely for the home and the rearing of family," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), and depict the role of men as "not that of homemaker but rather that of the family breadwinner." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 n.20 (1975). In the not-so-distant past, these gender stereotypes were repeatedly reinforced by federal and state statutes and even sanctioned by the Court. *See Hibbs*, 538 U.S. at 729; *see, e.g., Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872); *Goesaert v. Clearly*, 335 U.S. 464, 466 (1948).

From the nation's origin, federal and state governments have denied women the liberties that were routinely bestowed upon men. As the United States correctly summarized in its briefing in *Hibbs*, "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded to men so long as any 'basis in reason' could be conceived for the discrimination." Brief of Respondent United States at 12, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368) 2002 WL 31455490, at *13 (citing *United States v. Virginia*, 518 U.S. 515, 531 (1996)). The United States noted that as a result, "state-sanctioned

discrimination pervaded virtually every aspect of women's lives." *Id.* (citing *United States v. Virginia*, 518 U.S. at 536-37 & n.9 (discussing history of discrimination against women seeking higher education)).

Throughout much of the 20th century, state-sponsored gender discrimination resulted in women being denied the right to vote, "hold office, serve on juries, or bring suits in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Frontiero*, 411 U.S. at 685. As the United States recognized, this gender discrimination, and the ubiquitous sex stereotypes that preceded, "took strong hold in matters of employment." Brief of Respondent United States at 13, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368) 2002 WL 31455490, at *13. In its briefing in *Hibbs*, the United States analyzed other laws that "excluded women from mining jobs, manufacturing and mechanical positions, construction work, teaching (at least after marriage), and occupations deemed to involve physically strenuous or hazardous work."[7]

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[7] This history of sex discrimination is long and pervasive. The United States' brief reviews this history of gender discrimination in employment. Brief of Respondent United States at 14, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368) 2002 WL 31455490, at *14 (citing Women's Bureau, U.S. Dep't of Labor, *Summary of State Labor Laws for Women*, 17 (1969) (17 States prohibited women from mining); *see also Holden v. Hardy*, 169 U.S. 366 (1898) (discussing Utah constitutional provision on mining); *Commonwealth v. Riley*, 97

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The *Hibbs* Court also acknowledged and analyzed "the history of the many state laws [that] limit[ed] women's employment opportunities." *Hibbs*, 538 U.S. at 728-30.

Not only have women been unjustly prohibited from engaging in certain types of employment as a result of state-sanctioned gender discrimination, "[s]tate laws frequently subjected women to distinctive restrictions, terms, conditions, and benefits for those jobs they could take." *Hibbs*, 538 U.S. at 729. For example, in *Muller v. Oregon*, 208 U.S. 412, 419 (1908), the Court upheld the constitutionality of a law

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N.E. 367, 369 (Mass. 1912) (restriction on work necessary "that the health and endurance of the individual may be ensured and the ultimate strength and virility of the race be preserved"); *Bd. of Rev. v. Johnson*, 76 So. 859 (Ala. 1917) (construction); *Grimison v. Board of Educ. of City of Clay Ctr.*, 16 P.2d 492, 493 (Kan. 1932) ("[R]eproduction is indispensable to continued existence of the human race, and if, following marriage of a female under contract to teach, the reproductive function should become operative, and should progress to fruition within the period of employment, successful performance of the contract on the teacher's part might be interfered with or prevented."); *Backie v. Cromwell Consol. Sch. Dist. No. 13*, 242 N.W. 389, 390 (Minn. 1932) (accepting a rule that gave unmarried teachers preference over married teachers); *Ansorge v. City of Green Bay*, 224 N.W. 119, 121 (Wis. 1929) ("Many circumstances . . . might lead to the belief that a male teacher would be more suitable for employment than a female teacher" and "the same may be said with respect to married and unmarried teachers."); *Jones Metal Prods. v. Walker*, 281 N.E.2d 1, 6 n.4 (Ohio 1972) (prohibiting the employment of women for jobs such as crossing watchman, gas or electric meter reader, baggage or freight handling, trucking, and jobs requiring heavy lifting).

that limited the hours that women could work. The Court reasoned that at least 19 States "impose[d] restrictions in some form or another upon the hours of labor that may be required of women," *id.* at 419 n.1, and that these restrictions were appropriate in order to protect a woman's "physical structure and a proper discharge of her maternal functions." *Id.* at 422. Connecticut prohibited women from working four weeks before and four weeks after childbirth. Conn. Gen. Stat. § 31-26 (repealed 1972). Ohio had prohibitions on the employment of women in specific occupations that required the routine lifting of more than 25 pounds. Ohio R. C. § 4107.43 (repealed 1982). Women were commonly fired or forced to take leave when they became pregnant, regardless of their ability to work. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (striking down rules regarding mandatory leave after the fifth month of pregnancy and limiting return to work until after child was three months old).

These state laws encouraged employers to systematically discriminate against women on the basis of sex. Despite "official action denying rights or opportunities based on sex" being well-documented in the "volumes of history," *United States v. Virginia*, 518 U.S. 515, 531 (1996), it was not until 1971 that "for the first time in our Nation's history, the Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws." *Reed v. Reed*, 404 U.S. 71, 73 (1971) (holding unconstitutional an Idaho Code provision that provided

that males were to be preferred over females when claiming they are equally entitled to a share of an estate). Five years passed following the *Reed* decision before the Court acknowledged that gender discrimination demands heightened scrutiny. *Craig v. Boren*, 429 U.S. 190, 197-99 (1976).

> The Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender or based on outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.

United States v. Virginia, 518 U.S. at 531.

Congress has taken action to address sex discrimination with the enactment of Title VII of the Civil Rights Act of 1964,[8] the Equal Pay Act of 1963[9] and the Pregnancy Discrimination Act.[10] The FMLA is a critical element in this overall remedial scheme. Despite these laws, sex discrimination persists. As the Court acknowledged in 1973, "it can hardly be doubted that women still face pervasive, although at times more subtle, discrimination in our educational

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[8] 42 U.S.C. § 2000(e) (2006).

[9] 29 U.S.C. § 206(d)(1) (2006).

[10] 42 U.S.C. § 2000e(k) (2006).

institutions [and] in the job market." *Frontiero*, 411 U.S. at 686. Even after Congress enacted the FMLA, the Court acknowledged that women have "suffered at the hands of discriminatory state actors during the decades of our nation's history." *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994).

B. Because Of This Documented History Of Sex Discrimination, Congress Did Not Need To Compile The Type Of Detailed Record Of Unconstitutional Conduct That The Court Found Lacking In *Kimel* And *Garrett*.

The Supreme Court has consistently affirmed that Congress, under Section 5 of the Fourteenth Amendment, is "to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and these conclusions are entitled to deference. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)). The Court recently recognized the appropriate deference to be accorded to an Act of Congress. "We fully appreciate that judging the constitutionality of Congress is the 'gravest and most delicate duty that [the] Court is called on to perform. The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States."[11] *Nw. Austin*

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[11] Of course, "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning

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Mun. Util. Dist. One v. Holder, 129 S.Ct. 2504 (2009). The Court has further explained that the long-standing history of invidious gender discrimination across the country warrants heightened scrutiny when analyzing statutory protections that attempt to remedy discrimination based on sex. *See, e.g.*, *Boren*, 429 U.S. at 197; *Hibbs*, 538 at 729-30.

An extensive review of Congress' legislative history when it has enacted remedial legislation pursuant to its Section 5 powers is unnecessary. In *Hibbs*, the Court noted that there were different standards for what was required of Congress in creating a legislative record depending on the harm the legislation sought to remedy. The Court stated that "[b]ecause the standard for determining the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations." *Id.* at 736. *See also Oregon v. Mitchell*, 400 U.S. 112 (1970) (nationwide ban on literacy tests upheld, despite geographically limited evidence of abuse); *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966) (Harlan, J., dissenting) (literacy test ban added to statute on the floor of Congress); *cf. Lopez v. Monterey County*, 525 U.S. 266 (1999) (deterrent provision of the Voting Rights Act sustained without examination of the legislative record); *Ansonia*

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remains the province of the Judicial Branch." *Hibbs*, 538 U.S. at 728 (citing *Kimel*, 528 U.S. at 81).

Bd. of Educ. v. Philbrook, 479 U.S. 60, 67 (1986) (Title VII's ban on religious discrimination was added "on the floor of the Senate with little discussion").

In *FCC v. Beach Comms.*, 508 U.S. 307 (1993), the Court observed that "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." 508 U.S. at 315. Furthermore, as the Court has repeatedly recognized, " . . . legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. . . . Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id.* Congress enacted the FMLA to remedy an extensive history of gender discrimination; therefore, the Court should require less evidence of the states' discriminatory actions in the FMLA's legislative record.

This conclusion – that less evidence of states' unconstitutional discrimination is required when a suspect classification is at issue – is supported by the Court's discussion of the legislative history in *Kimel*, 528 U.S. at 89-91; *Garrett*, 531 U.S. at 368-72; and *Hibbs*, 538 U.S. at 729-35. In *Kimel* and *Garrett*, the Court examined the legislative history of the ADEA and the ADA extensively. These decisions analyzed the legislative history in depth because the Court had to determine the nature of the alleged constitutional

violations that Congress sought to remedy. Because the Court was reviewing statutes that dealt with non-suspect classifications, thus only triggering rational basis review, the Court required extensive proof of state discrimination in the legislative records. *Kimel*, 528 U.S. at 83-4; *Garrett,* 531 U.S. at 366. In *Kimel*, the Court explained that "[o]lder persons . . . unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'" 528 U.S. at 83.

The Court also noted in *Kimel* that "[t]he appropriateness of remedial measures must be considered in light of the evil presented," thereby requiring the Court to identify the "evil presented." 528 U.S. at 89 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). Because it was not clear that the ADEA remedied unconstitutional age discrimination, the Court was required to review the legislative record in great detail. This review convinced the Court that Congress failed to "uncover any significant pattern of unconstitutional [age] discrimination." *Kimel*, 528 at 91. The Court found that the ADEA prohibited very little unconstitutional conduct and as a result there was "no reason to believe that broad prophylactic legislation was necessary." *Id.* at 91. Similarly, the Court in *Garrett* found that Congress had failed to identify a pattern of unconstitutional state employment discrimination against people with disabilities. *Garrett,* 531 U.S. at 368-72. Employing the rational basis test, the Court posited that it "would be entirely rational (and therefore constitutional) for a state

employer to conserve scarce financial resources by hiring employees who are able to use existing facilities." *Id.* at 372.

In contrast to *Kimel* and *Garrett*, *Hibbs* did not require an in-depth analysis of the legislative record. Before reviewing the legislative history of the FMLA, the Court examined a history of decisions that demonstrated the widespread problem of gender discrimination in employment. *Hibbs*, 538 U.S. at 729-30. The pervasiveness of the constitutional violation remedied by the FMLA made an extended recitation of the legislative history unnecessary, especially in light of the Court's numerous decisions regarding gender discrimination.

The heightened scrutiny review, combined with the well-documented history of state gender discrimination in the employment context, alleviated the need for a microscopic review of the FMLA's legislative history in *Hibbs*. 538 U.S. at 730-32. In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Court explicitly recognized that a less extensive legislative record is required when gender discrimination is at issue. *See generally* 541 U.S. 509. As the United States noted in its briefing in *Hibbs*:

> Section 5 legislation, like the FMLA, that Congress designed to combat employment discrimination, 'outdated misconceptions,' *J.E.B.*, 511 U.S. at 135, and entrenched stereotypes – discrimination that has triggered and continues to trigger the application of heightened scrutiny by this Court – has been sustained as appropriate Section 5 legislation

> without determining whether the legislative record documented a history of constitutional violations by the States.

Brief of Respondent United States at 28, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368) 2002 WL 31455490, at *28.

The Court has already acknowledged the enduring and widespread pattern of unconstitutional sex discrimination in employment by the states. Accordingly, requiring a thorough review of the legislative record would not enhance the Court's interpretation of statutory language. The Court has, through its prior decisions, established that Congress is entitled to great deference when passing legislation to combat such invidious discrimination. Thus, a thorough review of the legislative record would be unnecessary in this situation.

C. Congress Nevertheless Documented That The Self-care Provision Responded To Unconstitutional Gender Discrimination.

Because Congress was acting pursuant to its powers under the Fourteenth Amendment to address gender discrimination in the granting of employment leave, Congress was not required to compile a comprehensive record merely repeating what decades of court cases demonstrated. Even though there was no need to establish an expansive record reciting the history of gender discrimination in employment,

Congress provided specific evidence in the FMLA's extensive legislative record confirming that it was acting to remedy unconstitutional gender discrimination. In a legislative effort spanning eight years and two presidential vetoes, Congress made it clear that the FMLA was intended to combat sex discrimination. Starting in 1985, Congress began to compile a legislative history showing that the self-care provision is an integral and indispensable part of the statute that the 103d Congress eventually enacted.[12] Without the self-care provision, the FMLA could not accomplish Congress' intent to eliminate gender discrimination by state and other employers.

1. The Self-care Provision Directly Responds To Sex Discrimination In The Granting Of Leave.

The FMLA sets forth the factual findings that the statute means to address. Congress recognized that illness affects careers of men and women differently. The self-care leave provision at its core is a direct response to gender discrimination in the granting of employment leave. The FMLA proactively addresses

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[12] A predecessor of the FMLA, the Parental and Disability Leave Act of 1985, was introduced by Representative Patricia Schroeder. *Parental and Disability Leave: Joint Hearing Before the Subcomm. on Civil Serv. and the Subcomm. on Comp. and Emp. Benefits of the Comm. on Post Office and Civil Serv. and the Subcomm. on Labor Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 1-2 (1985).

this ongoing discrimination against women. The language of the statute explicitly addresses female-specific serious medical conditions. *See* 29 U.S.C. § 2601(b)(4) ("eligible medical reasons" include "maternity related disability"). Subsequent regulations explaining the FMLA confirmed this. 29 C.F.R. § 825.114(a)(2)(ii) ("serious health condition" includes "any period of incapacity due to pregnancy, or for prenatal care"). Congress left no doubt that discrimination against women was the target of the FMLA. The Senate stated,

> [w]orkers and their families have always suffered when a family member loses a job for medical reasons. But such losses are felt more today because of the dramatic rise in single heads of household who are predominantly women workers in low-paid jobs. For these women and their children, the loss of job because of illness can have devastating consequences.

S. REP. NO. 103-3 at 7 (1993). With nearly "57 million women . . . working or looking for work," in 1990, Congress saw that women needed more than ever the protection from sex discrimination provided in the FMLA. *Id.*

The self-care provision attacks the evils caused by gender stereotypes by enabling "leave [to be] available for eligible medical reasons . . . on a gender-neutral basis." § 2601(b)(4). Congress understood the lack of job protections afforded to women who needed leave in order to care for their own health due to

pregnancy. During a 1985 hearing, Congress recognized:

> Only a few companies provide paid leave other than disability leave for childbirth. The limited protection that is provided derives from the Pregnancy Discrimination Act of 1978, which requires employers who provide disability insurance coverage to treat pregnancy as a disability. But there is no requirement that employers provide disability insurance in the first instance, and only half of all employers provide such coverage. In addition, the employers least likely to provide disability coverage are those with the highest concentration of female employees.[13]

Throughout the FMLA hearings, Congress heard testimony from women who lost their jobs because of pregnancy and childbirth-related leave, notwithstanding the protections provided by the Pregnancy Discrimination Act.[14] Eleanor Holmes Norton testified

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[13] *Parental and Disability Leave: Joint Hearing H.R. 2020 Before the Subcomm. on Civil Service and the Subcomm. on Compensation and Emp. Benefits of the H. Comm. on Post Office and Civil Service and the Subcomm. on Labor Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 2 (1985) (statement of Representative William Clay, Chair, Subcommittee on Labor-Management Relations).

[14] *Parental and Medical Leave Act of 1987: Hearing on S.249, pt. 2, Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the S. Comm. of Labor and Human Res.*, 100th Cong. 16-19 (1987) (statement of Linda Pillsbury (despite being assured that she would have a job to return to, she was

(Continued on following page)

that "women who are temporarily unable to work due to pregnancy, childbirth and related medical conditions such as morning sickness, threatened miscarriage, or complications arising from child birth, often lose their jobs because of the inadequacy of their employer's leave policies."[15] Likewise, at a 1987 House Subcommittee hearing, Congress heard testimony with respect to that version of the FMLA from Donna Lenhoff, the Associate Director for the Legal Policy and Programs at the Women's Legal Defense Fund. Ms. Lenhoff explained that the protection provided by the bill

> means security and certainty for the American family faced with the serious health problems of one of its breadwinners. This is an essential protection for single-parent and low-income families. It means that one of the risks that currently faces [sic] families planning to have children, the risk of job loss of the mother, is eliminated. . . . It means that women deciding whether to bear children can be secure in knowing that they can

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told three weeks after her child was born that her job no longer existed due to a reorganization); statement of Rebecca Webb (despite a verbal agreement with her supervisor for three months of leave post-childbirth, Ms. Webb, when seven months pregnant, was told she would not receive any leave and that she had to renegotiate her contract immediately)).

[15] *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 147 (1986).

> continue their incomes after childbirth and the attendant disability period is over.

The Family and Medical Leave Act of 1987: Joint Hearings on H.R. 925 Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor, 100th Cong. 237 (1987).

Congress also intended the FMLA to address gender discrimination against men. In a joint hearing before the House Subcommittee on Labor and Management Relations, the Washington Council of Lawyers testified: "Parental leave for fathers . . . is rare. . . . Where child-care leave policies do exist, men, both in the public and private sectors, receive notoriously discriminatory treatment in their requests for such leave."[16]

Without self-care leave, the childbirth, adoption, and family-care provisions would often fall short of achieving their purpose.

2. Self-care Seeks To Guarantee That The Sexes Are Treated Equally In The Granting Of Leave.

While Congress was responding directly to gender discrimination in the granting of leave, Congress

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[16] *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 147 (1986).

also perceived that a remedy imposing a gender differential would likely further disadvantage the gender that it purported to help. If the statute imposed special obligations on employers with regard to one sex, then it would make applicants of the other, less encumbered sex more attractive to hire. Congress found that

> due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; [but] . . . employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

29 U.S.C. § 2601 (a)(5)-(6) (2006).

Congress addressed this challenge by bundling together four categories of leave with the combined effect of neutralizing the gender inequalities entrenched in the workforces of large employers, including the states. The purpose of this integrated package is made plain by the statute itself:

> to accomplish [relief for working families dealing with illness] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that

> leave is available for eligible medical reasons . . . and for compelling family reasons, on a gender-neutral basis; and . . . to promote the goal of equal employment opportunity for women and men.

29 U.S.C. § 2601(b)(4)-(5) (2006).

Congress recognized that the self-care provision was what kept the FMLA from having a discriminatory effect on women.

> A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. [The FMLA], by addressing the needs of all workers, avoids such a risk. Thus [the FMLA] is based . . . on the guarantees of equal protection and due process embodied in the Fourteenth Amendment.

H.R. REP. NO. 103-8, pt. 1, at 29 (1993).

This legislative intent is unmistakable in even the earliest version of the legislation.[17] The four legs of the statute were already fastened together in the predecessor of the FMLA, first introduced by Representative Patricia Schroeder in April 1985.[18] The next

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[17] A 1991 congressional report details the bill's history up until that time. See H.R. REP. NO. 102-135, pt. 1, (1991).

[18] *Id.* at 16. ("H.R. 2020, the Parental and Disability Leave Act of 1985 . . . required that employees be allowed parental leave in cases involving the birth, adoption or serious illness of a

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year, at a House subcommittee hearing on an updated bill, the chair of the National Women's Political Caucus, Irene Natividad, vividly described the integral connection of family-care and self-care. "[M]y primary purpose is to stress that parental and medical leave are inseparable. In the words of the old song, 'You can't have one without the other,'" *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the Comm. on Educ. and Labor*, 99th Congress, 33 (1986). Ms. Natividad, continued:

> Adoption of parental leave protections without medical leave would lead to ill-will in the workplace between married women and single women and between women and men. Worst of all, parental leave without medical leave would encourage discrimination against women of child-bearing age, who constitute approximately 73% of all women in the labor force. Employers would tend to hire men, who are much less likely to claim this benefit. . . . Parental leave without medical leave would be the modern version of protective labor laws, which also required employers to apply different personnel policies to women than men.

Id. at 34.

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child and temporary disability leave in cases involving the inability to work due to nonoccupational medical reasons.")

Throughout its consideration of the FMLA, Congress continued to target sex discrimination. A House committee chaired by Rep. Schroeder in 1988

> recognize[d] that a special "maternity leave" requirement could be used to deny women job opportunities. Faced with the knowledge that job-protected leaves were required for working mothers and working mothers only, hard-pressed [employers] would very likely be reluctant to hire or promote women of child-bearing age. However, since employers would be required under [the FMLA] to provide job-protected leave for all employees, they would have little incentive to discriminate against women.

H.R. REP. NO. 100-511, pt. 1, at 9 (1988).

Even though the self-care and family-care provisions of the bill had always supported each other in Congress' design, self-care appeared in a separate section of the bill up until 1991. In 1990, leave provisions for childbirth, adoption, and family-care appeared as a "family leave requirement," listed sequentially just as they would be in the FMLA enacted three years later. Family and Medical Leave Act of 1990, H.R. 770, 101st Cong. § 103 (1990). But self-care leave appeared separately, in Section 104, as a "temporary medical leave requirement." *See* H.R. REP. NO. 101-479, at 6 (1990). Family-care leave was capped at ten work weeks in any 24-month period, while self-care leave was more generous: 15 work weeks per 12-month period. *Id.* Nevertheless, the

same statement of purpose covered both sections, and, significantly, family-care and self-care both were subject to the identical certification requirements in Section 105 for the "serious health condition." *Id.* Thus, the commonality of language, certification, and purpose still confirm Congress' unified intention for the two mutually supporting varieties of leave. Then, in the 1991 version of the legislation, Congress determined that self-care should no longer appear as a stand-alone provision. Instead, Congress brought self-care and family-care together under one umbrella in the same section of the bill. *See* H.R. REP. NO. 102-303, at 10 (1991).

As the bill went through its successive re-draftings, Congress received expert warnings about the danger of disadvantaging working women by appearing to require more leave for them than for male workers. For example, a House committee considered a statement submitted by the National Federation of Independent Business (NFIB), relaying the results of a 1991 poll of small business owners. *Legislative Hearing on H.R. 1, the Family and Medical Leave Act. Hearing Before the Subcomm. on Labor-Mgmt. Relations of the H. Comm. on Educ. and Labor*, 103d Cong. (1993). The poll indicated that "45% of respondents will be less likely to hire young women" if the FMLA were passed. *Id.* at 92. The NFIB warned that the bill had the potential to exacerbate sex discrimination:

> Requiring employers to provide parental leave benefits creates clear pressures for

> subtle discrimination based on age *and* sex. When choosing between two equally qualified candidates, an employer may be more likely to hire the candidate least [sic] likely to take the leave. It is the wage levels and jobs of women of childbearing years which are most at risk in such a situation.[19]

Id. at 95.

Senator Nancy Kassebaum expressed a similar caution on the floor of the Senate. She cited an economist's prediction that to mandate only family leave "will have a negative impact on job opportunities for women." 103 Cong. Rec. S1694 (1993). Because "the expected cost of parental leave is greater for women than for men," employers would opt to hire male workers whose leave time will cost less than that of female workers. *Id.* "It is thus possible," according to the economic study cited by Senator Kassebaum, "that mandated benefit programs can work against the interest of those who most require the benefit being offered." *Id.*; *see also* H.R. REP. NO. 103-8, at 65-66 (1993) (excerpting the 1989 testimony of a personnel director who anticipated that "working women will be viewed as the most likely candidates for parental leave, hidden discrimination will occur if this bill becomes law").

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[19] The survey presumably referred to the 1990 version of the FMLA, in which the crucial fourth provision – self-care leave – was listed separately from family-care leave. *See* Section 103 (a)(1)(A) to (C) of H.R. 770, H.R. REP. NO. 101-479, at 5 (1990).

Congress was well aware of this concern and acted to minimize this danger by balancing family-care with self-care. Even the early legislative discussion demonstrates this. A 1989 Senate report noted that

> [a] significant benefit of the temporary medical leave provided by this legislation is the form of protection it offers women workers who bear children. Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy-related disability. Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect.

S. REP. NO. 101-77, pt. 1, at 32 (1989). Self-care leave remained an integral part of the FMLA as signed into law in 1993. 29 U.S.C. § 2612(a)(1)(D). On the strength of the self-care provision, Senator Boxer explained to the Senate:

> The act does not just apply to women, but to men and women, to fathers, as well as to mothers. . . . So to say that women will not be hired by business is a specious argument, unless you assume that men are not caring parents and men are not loving sons. I believe that they are. Men also get sick. They get cancer. They get heart disease. They have

> ailments. And this bill applies to men and women.

103 Cong. Rec. S1697 (1993). These efforts, which spanned three presidencies and five sessions of Congress, and even survived two presidential vetoes, represent an acknowledgment by Congress not only of the necessity of this legislation, but also of the importance of thoughtful consideration throughout nearly a decade of debate. The FMLA as a whole, with all four of its leave provisions operative, represents Congress' unified plan to combat gender discrimination when employees need time off to handle illness or temporary disability in the family. Therefore, the statute "provides no incentive to discriminate against women, because it addresses the leave needs of workers who are young and old, male and female, married and single." H.R. REP. NO. 102-135, pt. 1, at 28 (1991).

3. Congress Found That, Despite State Laws Prohibiting Sex Discrimination, Most States, Like Other Employers, Were Free To Engage In Sex Discrimination In Employment.

In order to address gender discrimination in the workplace, Congress also analyzed various leave policies provided by some of the states. *Hibbs* at 731. However, as the United States recognized in its briefing in *Hibbs*, "Insistence on well-documented proof of particularized constitutional violations is 'hardly practicable' if, 'during most of our country's

existence . . . women were completely excluded' from many employment opportunities." Brief for Respondent United States at 35-6, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368) 2002 WL 31455490, at *35-6 (quoting *J.E.B. v. Alabama*, 511 U.S. 127 at 131 (1994)). It is impossible to discriminate against women in the workplace if they are not in the workplace to begin with. This type of subtle discrimination is difficult to prove because the laws themselves were based on gender stereotypes. *Id.* at 36-37.

Congress considered a report of the states' response to this issue in a House Report prepared for the vote on what was to become the final version of the FMLA. *See* H.R. REP. NO. 103-8, pt. 1, at 77-83 (1993) (drawing on information from the Department of Labor current as of August 1992). The report explained that although "[t]he debate on family and medical leave suggests that many States have already passed such leave benefits as are contained in [the FMLA]. Yet, that is not the case." *Id.* at 78. Fourteen states had no law resembling the FMLA, and another fourteen had passed leave legislation limited to public sector. *Id.* Furthermore, "[n]o State ha[d] . . . pass[ed] State legislation that is as broad in scope and coverage as that pending in Congress." *Id.* The report then provided a state-by-state synopsis of the benefits guaranteed by law in the individual

states. *Id.* at 78-83.[20] Thus, Congress was fully informed of the inadequacy of the patchwork provisions for family leave in the individual states, and Congress determined that a targeted, national remedy was required to help ensure the promises of the Fourteenth Amendment.

The House Report also recognized that some state civil service regulations might provide additional coverage for state employees. *Id.* at 78. However, such regulations are enforceable primarily through administrative procedures. The road to the state courthouse for aggrieved state employees is a long one. Moreover, without federal legislation, federal judicial relief would be available to state employees only upon a showing of a constitutional violation, a burden that few families needing leave for serious health issues would be willing or able to shoulder. The Court has observed that it is not necessary to prove the targeted type of discrimination with evidence from each and every state. Instead, it recognized that evidence of some discrimination in some states is more than sufficient to uphold blanket Federal legislation correcting a Constitutional wrong.

> Nationwide application avoids the often difficult task of drawing a line between those States where a problem is pressing enough to

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[20] A Senate Report also surveyed data and described the inadequate leave provisions in the policies of private employers. *See* S. REP. NO. 103-3, at 14-15 (1993). The report summarized existing state legislation as well. *Id.* at 20-21.

> warrant [such] federal intervention and those where it is not . . . nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country.

Oregon v. Mitchell, 400 U.S. 112, 283-84 (1970) (Stewart, J., concurring in part and dissenting in part).

Indeed, Justice Stewart recognized that "[i]n the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Id.* at 284.

Congress, by enacting the FMLA, put state employers on notice that federal remedies are available, and in this way Congress encouraged the states to establish conforming gender-neutral leave policies. Those policies would then already be in place when families found themselves in need, often unexpectedly so. The remedial effect of the FMLA is prophylactic in that it encourages the states to bring their own employment policies, as well as their statutes, up to a standard that does not offend the Constitution with regard to equal protection for the sexes.

III. The Court Should Not Unravel Interrelated Provisions Of The FMLA, Requiring Independent Support For Every Provision In Determining Whether The Self-care Provision Is Valid Section 5 Legislation.

When Congress creates an interrelated response to an issue, the Court should not separate the components requiring a legislative record supporting each subpart. Congress has not, and cannot, meaningfully legislate in this manner. The Court should not view each leave provision of the FMLA separately, but rather, it should analyze the Act as a whole.

Congress envisioned the self-care provision as complementary to the other three varieties of leave. Congress acted in a coordinated attempt to rectify what it perceived to be a significant and fundamental issue of gender discrimination in employment. Reports from both the House and Senate emphasized the interdependence of the self-care and family-care provisions of the FMLA. A 1991 house report explains:

> The FMLA addresses the basic leave needs of all employees. *It protects employees from possible job loss as a result of a serious health condition, including childbirth or the care of a family member.* It does not favor the needs of one group of employees over the needs of other employees. . . .

H.R. REP. NO. 102-135, pt. 1, at 27-28 (1991) (emphasis added).

While the *Hibbs* Court addressed only the limited issue presented to it, its analysis is applicable to the self-care provision. Congress validly abrogated Eleventh Amendment immunity with respect to the self-care provision for many of the same reasons the Court found that the family-care provision was a valid abrogation.

The Court has already interpreted the FMLA family-care provision as a valid abrogation of Eleventh Amendment immunity; it would defy logic to interpret Congress' valid abrogation of Eleventh Amendment immunity as applying only to one of the four subsections of the FMLA's leave provisions. Not only would this be illogical, but it would also squander limited legislative resources. This type of legislative review would consume the limited resources of Congress as well as those of the court system. Each and every interrelated subsection of a new law should not be individually subjected to litigious scrutiny over the legislative record.

The Court's treatment of different sections of the ADA does not counsel a different conclusion. In *Garrett,* the Court held that Title I of the ADA was not a valid abrogation of Eleventh Amendment immunity. 531 U.S. at 374. Title I addresses discrimination in employment and the Court was not convinced that the evidence before Congress supported a history of unconstitutional disability-based discrimination by the states. *Id.* at 368. In contrast, the Court in *Lane* found that Title II of the ADA was a valid abrogation of the States' immunity. *Tennessee v. Lane*, 541 U.S.

509, 529 (2004). Title II addresses discrimination in public accommodations.

The Court did not parse interrelated parts of a statute when it found that Title II of the ADA was a valid abrogation of Eleventh Amendment immunity and that Title I was not. Rather, the Court examined two separate provisions of a statute. Indeed, in *Garrett*, the Court recognized the vast difference between the employment and the public accommodation provisions of the ADA. *See* 531 U.S. 356.

The FMLA addresses only employment discrimination and is fundamentally different from the ADA. The FMLA's four original leave provisions work together in a different way than the separate titles of the ADA. The interrelated FMLA provisions are not divergent and disconnected like the titles of the ADA. The four provisions of the FMLA are all centered on one purpose: to remedy gender discrimination in the granting of leave. Because the FMLA is designed to address gender discrimination, the Fourteenth Amendment's force can be brought to bear on the issue. Indeed as discussed *infra* at 45 to 51 over the years that Congress considered the FMLA, Congress treated the self-care and family-leave provisions as part of an integrated response to the problem it was confronting.

Finally, reviewing the language of the FMLA reveals Congress' intent to use these provisions as a combined solution. For example, the family-care and self-care provisions both use the phrase "serious

health condition." 29 U.S.C. § 2612(a)(1)(C)-(D) (2006). Congress would not intend that this phrase have a different meaning for each provision. Also, when describing intermittent leave, Congress combines family-care and self-care leave. 29 U.S.C. § 2612(b)(1). Had Congress meant to separate these provisions, it would have done so. Similarly, this Court should not separate these interrelated provisions in determining whether the FMLA responds to gender discrimination in leave policies.

Contrast the interrelated four provisions of the FMLA with the later amended section (E), the military caregiver family-leave provision. Congress drafted, debated, and passed the first four provisions together as a group in 1993 as the Family and Medical Leave Act. Those provisions, as a targeted reaction to gender discrimination, work together as a single response. By contrast, subsection (E) of the FMLA was passed 14 years later as part of the FY 2008 Defense Appropriations Bill. 153 Cong. Rec. S10,371 (daily ed. July 31, 2007) (statement of Sen. Christopher Dodd). Additionally, the first four provisions, as a group, are designed to address a fundamentally different issue from subsection (E). Congress' differing considerations in passing subsection (E) shows that when Congress crafts different sections to address different issues, it acts accordingly.

IV. The FMLA Is A Congruent And Proportional Response To Gender Discrimination, The Constitutional Harm Congress Addressed In The FMLA.

Even when acting pursuant to the broad powers granted under the Fourteenth Amendment, Congress must make its response congruent and proportional to the harm it seeks to remedy. *Boerne*, 521 U.S. at 530 (1997). The Court explained there must be a "congruence and proportionality" between means and ends when Congress legislates pursuant to this power. *Kimel*, 528 U.S. at 63 (citing *Boerne*, 521 U.S. at 520 on the congruent and proportional standard); *Garrett*, 531 U.S. at 365 (again citing the *Boerne* standard in relation to Section 5 legislation); *Hibbs*, 538 U.S. at 728 (2003) (citing *Boerne*, 521 U.S. at 519-24).

When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999). In *Hibbs*, the Court held that the FMLA's family-care provision was "congruent and proportional to the targeted violation," namely sex discrimination in the workplace. *Hibbs*, 538 U.S. at 737. The Court reached this conclusion because the FMLA's protections are narrowly tailored and contain significant limitations on their applicability. *Id.* at 738-739. The Court noted that not only does the FMLA provide solely for unpaid leave, but it also limits leave availability to

employees of a year or more who have worked at least 1,250 hours in the last year. *Hibbs*, 538 U.S. at 738-40; *see also* 29 U.S.C. §§ 2611(2)(A), 2612(a)(1). Additionally, high ranking employees, including state elected officials and their staff are not entitled to FMLA leave. 29 U.S.C. §§ 2611(2)(B)(i), (3). These limitations placed on the reach of the FMLA's power, especially in State government, demonstrate clear Congressional intent to make these provisions congruent and proportional.

At the same time Congress limited the applicability to employees who have been employed for at least a year, it provided other limitations and restrictions on how this leave could be taken. The FMLA does not provide a blanket right to take leave by any employee and at any time. The FMLA, in fact, requires advance notice of foreseeable leave. 29 U.S.C. § 2612(e). Congress acknowledged the potential burden on employers and created a number of requirements necessary to be eligible for leave. For example, an employer is entitled to request certification by a doctor to demonstrate a serious health condition requiring FMLA leave. 29 U.S.C. § 2613(a). Similarly, the medical leave provisions allow an employer to require certification from a health care provider as to the need for employees to care for a family member. 29 U.S.C. § 2613(a). These limitations demonstrate that the FMLA's targeted scheme was designed to redress gender discrimination in a congruent and proportional manner, in compliance with the Court's Fourteenth Amendment jurisprudence.

These same limitations, which helped convince the Court that the FMLA's family-care provision was congruent and proportional, apply to the FMLA's self-care provision as well. The FMLA even went so far as to limit recovery to actual losses and liquidated damages equal to the amount of actual losses for willful violations against State defendants for FMLA violations. The FMLA provides that employers shall be liable only for "damages equal to the amount of any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation." 29 U.S.C § 2617. These limitations further show Congress' desire to provide a congruent and proportional response to unconstitutional gender discrimination.

The FMLA, with the self-care provision, fills the gap in coverage left by the Pregnancy Discrimination Act and Title VII. The FMLA's legislative record indicates that the FMLA was intended to root out gender discrimination that persisted despite earlier legislation. Congress acknowledged that Title VII had been ineffective in deterring the two types of discrimination that the FMLA is designed to prevent: employers' refusal to grant family leave to men, and employers' reluctance to hire or promote women based on gender stereotypes. Congress observed, that "[d]espite the apparent conflict with Title VII of the Civil Rights Act, only 37 percent of the[ ] companies extended parental leave rights to fathers and often on a different (and less extended) basis than to mothers." H.R. REP. NO. 100-511, pt. 2, at 24 (1988).

Moreover, Congress designed the self-care provision of the FMLA to fill the gap in coverage that still remained after the passage of the Pregnancy Discrimination Act of 1978 (PDA), which amended Title VII of the Civil Rights Act of 1964. "Thus, while Title VII, as amended by the Pregnancy Discrimination Act, has provided that benefits and protection be provided to millions of previously unprotected women wage earners, it leaves gaps which an anti-discrimination law by its nature cannot fill. [The FMLA] is designed to fill those gaps." H.R. REP. NO. 103-8, pt. 2, at 11 (1993).

Under the PDA, "[w]omen who become disabled because of pregnancy-related conditions are entitled to paid sick leave, personal leave, disability benefits, medical insurance, and hospitalization on the same basis as other disabled workers." *Id.* at 10. New mothers "are entitled to return to work on the same basis as other temporarily disabled workers." *Id.* Thus, the PDA left employers free to deny new mothers either childbirth leave or reinstatement as long as the employers did not offer those benefits to workers temporarily disabled for reasons other than pregnancy. This gap was closed by the self-care provision of the FMLA. In this way, Congress designed the self-care provision of the FMLA to work hand in hand with the childbirth provision so that neither women nor men are disadvantaged in the labor market by illnesses specific to their sex.

It is up to Congress to dictate what type of remedy would be effective to rectify a national wrong. *Boerne*, 521 U.S. 507. Congress' findings with respect to the

ineffectiveness of Title VII's nondiscrimination norm amply support its decision to enact the FMLA's more specific remedial scheme.

The self-care provision is narrowly targeted to remedy invidious sex-based discrimination in the workplace. By enacting the FMLA, Congress created a narrow cause of action that would protect only qualified employees so as to avoid overburdening employers.

V. The Circuits' Analysis Of The Self-care Provision Largely Contradicts The Rationale Of *Hibbs*.

As though the *Hibbs* decision had never come down, six Circuit Courts of Appeals have held that the self-care provision of the FMLA is not a valid abrogation of the States' Eleventh Amendment immunity. Those Circuits failed to do what this Court would expect: be informed by Supreme Court precedent on a Constitutional issue. Even though the *Hibbs* decision confines itself to the family-care provision of the FMLA, the logic of that decision supersedes much of the prior precedent on the issue. It certainly undermines the rationale for finding no valid abrogation of immunity upon which most of these circuits relied. In particular, the *Hibbs* Court found that attacking gender discrimination was Congress' principal motivation for passing the FMLA. Circuit courts that have addressed the self-care provision since the *Hibbs* decision have ignored this

crucial finding. This Court should adopt and develop the rationale of the *Hibbs* decision, which recognized a legislative history sufficient to justify abrogation of Eleventh Amendment immunity with regard to the family-care provision of the FMLA.

Many Circuits continue to rely on precedent that was expressly rejected in *Hibbs*. Those Circuits have engaged primarily in one of three flawed modes of analysis. First, some chose to apply reasoning that was expressly rejected by *Hibbs*. In particular, they overlooked the fact that *Hibbs* found the FMLA to be Congress' response to gender discrimination. Second, some Circuits felt compelled to follow their own pre-*Hibbs* precedent regarding self-care because *Hibbs* did not address self-care specifically. Third, the superseded precedent of other Circuits was merely adopted by others, with little further analysis of their own. These analyses provide no guidance to the Court.

One instance of a Circuit relying upon a rationale explicitly rejected by *Hibbs* appears in *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000), where the Eighth Circuit held that the entire FMLA was an unconstitutional exercise of congressional power. The court reasoned that "the FMLA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 1096 (quoting *Boerne*, 521 U.S. at 537). But, this rationale was explicitly rejected by the *Hibbs* decision, which held that, at the very least, the family-care provision of the FMLA was a valid abrogation of Eleventh

Amendment immunity. 538 U.S. at 740. The Eighth Circuit nevertheless continued to rely on this partially overruled reasoning in *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007) (per curiam). There, the court explained that "[the] district court properly dismissed with prejudice Miles's FMLA claim" because "[a]s an agency of the state of Missouri, . . . the Center is entitled to Eleventh Amendment immunity." 481 F.3d at 1107 (citing *Townsel*, 233 F.3d at 1096). While the panel did admit that *Hibbs* in part overruled some of their reasoning, the court did not explain which part of their decision was previously overruled. Additionally they did not explain why they relied on a decision whose analysis of the FMLA was expressly overruled in *Hibbs*.

Other courts that continue to apply the overruled rationale do so without regard to the effect of the *Hibbs* decision on their holdings and on the analysis they had employed in their pre-*Hibbs* decisions. For instance, in *Touvell v. Ohio Dep't of Mental Retardation*, 422 F.3d 392 (6th Cir. 2005), the Sixth Circuit supported its analysis with its own pre-*Hibbs* precedent. The *Touvell* court simply relied upon pre-*Hibbs* analysis, stating, "We do not believe that *Hibbs* undermines the holdings of the First, Second, Fourth, Tenth, and Eleventh Circuits that the self-care provision of the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity." 422 F.3d at 400.

Likewise, the Fifth Circuit, in *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318 (5th Cir. 2008), relied on

its pre-*Hibbs* precedent. Prior to *Nelson*, the Fifth Circuit in *Kazmier v. Widmann*, had "declared that the Eleventh Amendment immunized states from suits for money damages brought under subsections C and D of § 2612(a)(1)." *Id.* at 321 (citing *Kazmier v. Widmann*, 225 F.3d 519, 526-29 (5th Cir. 2000)). The Fifth Circuit observed that, since *Hibbs*, three other circuits had found no valid abrogation of Eleventh Amendment immunity. Without further analysis, the court found that the "decision in *Kazmier* still remains the law of this circuit with respect to subsection D." *Id.*

Finally, in *McKlintic v. 36th Judicial Circuit Court*, 508 F.3d 875 (8th Cir. 2007), the court stated that it was confined by its pre-*Hibbs* precedent. The court felt that it was "bound by the earlier decision of a [different] panel of [that] court." 508 F.3d at 877 (citing *South Dakota v. United States Department of Interior*, 487 F.3d 548, 551 (8th Cir. 2007)). Constrained by its own precedent, the court declined to "reconsider the question of whether the Eleventh Amendment bars a suit against a state for violation of the self-care provisions of the FMLA." *Id.*

By relying on others' superseded precedents, those Circuits have built a house of cards. This Court should not take shelter in it, but should instead use the solid rationale of the *Hibbs* Court to construct an enduring resolution to this weighty issue.

CONCLUSION

The *Hibbs* decision, rendered only eight years ago, provides all the guidance necessary for this Court to find that the self-care provision is a valid abrogation of Eleventh Amendment immunity. Not only is the legislative history of the FMLA, as a whole, sufficient to support the entire body of the legislation as a valid abrogation, but the self-care provision's intent and effect proves its constitutionality standing alone. The Legislative and Executive branches underwent a rigorous process to craft and pass this legislation as valid Fourteenth Amendment prophylaxis. We respectfully request that this Court reverse the decisions of the United States District Court for the District of Maryland as well as the Court of Appeals for the Fourth Circuit and remand for further proceedings.

Respectfully submitted this 20th day of September, 2011.

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Family and Medical Leave Act

29 U.S.C. § 2601

a) Findings

Congress finds that –

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act –

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

Subchapter I. General Requirements for Leave (Refs & Annos)

§ 2611. Definitions

As used in this subchapter:

(1) Commerce

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed –

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include –

(i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

(D) Airline flight crews

(i) Determination

For purposes of determining whether an employee who is a flight attendant or flight crewmember (as such terms are defined in regulations of the Federal Aviation Administration) meets the hours of service requirement specified in subparagraph (A)(ii), the employee will be considered to meet the requirement if –

(I) the employee has worked or been paid for not less than 60 percent of the applicable total monthly guarantee, or the equivalent, for the previous 12-month period, for or by the employer with respect to whom leave is requested under section 2612 of this title; and

(II) the employee has worked or been paid for not less than 504 hours (not counting personal commute time or time spent on vacation leave or medical or

sick leave) during the previous 12-month period, for or by that employer.

(ii) File

Each employer of an employee described in clause (i) shall maintain on file with the Secretary (in accordance with such regulations as the Secretary may prescribe) containing information specifying the applicable monthly guarantee with respect to each category of employee to which such guarantee applies.

(iii) Definition

In this subparagraph, the term "applicable monthly guarantee" means –

(I) for an employee described in clause (i) other than an employee on reserve status, the minimum number of hours for which an employer has agreed to schedule such employee for any given month; and

(II) for an employee described in clause (i) who is on reserve status, the number of hours for which an employer has agreed to pay such employee on reserve status for any given month,

as established in the applicable collective bargaining agreement or, if none exists, in the employer's policies.

(3) Employ; employee; State

The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer

(A) In general

The term "employer" –

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes –

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the Government Accountability Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits

The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance,

disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 1002(3) of this title.

(6) Health care provider

The term "health care provider" means –

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent

The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person

The term "person" has the same meaning given such term in section 203(a) of this title.

(9) Reduced leave schedule

The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary

The term "Secretary" means the Secretary of Labor.

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves –

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter

The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is –

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse

The term "spouse" means a husband or wife, as the case may be.

(14) Covered active duty

The term "covered active duty" means –

(A) in the case of a member of a regular component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and

(B) in the case of a member of a reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of Title 10.

(15) Covered servicemember

The term "covered servicemember" means –

(A) a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or

(B) a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

(16) Outpatient status

The term "outpatient status", with respect to a covered servicemember, means the status of a member of the Armed Forces assigned to –

(A) a military medical treatment facility as an outpatient; or

(B) a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(17) Next of kin

The term "next of kin", used with respect to an individual, means the nearest blood relative of that individual.

(18) Serious injury or illness

The term "serious injury or illness" –

(A) in the case of a member of the Armed Forces (including a member of the National Guard or Reserves), means an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating; and

(B) in the case of a veteran who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during a period described in paragraph (15)(B), means a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in

the Armed Forces) and that manifested itself before or after the member became a veteran.

(19) Veteran

The term "veteran" has the meaning given the term in section 101 of Title 38.

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§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of

the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(3) Servicemember family leave

Subject to section 2613 of this title, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.

(4) Combined leave total

During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period.

(5) Calculation of leave for airline flight crews

The Secretary may provide, by regulation, a method for calculating the leave described in paragraph (1)

with respect to employees described in section 2611(2)(D) of this title.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and subsection (b)(5) or (f) (as appropriate) of section 2613 of this of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. Subject to subsection (e)(3) of this section and section 2613(f) of this title, leave under subsection (a)(1)(E) of this section may be taken intermittently or on a reduced leave schedule. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section, that is foreseeable

based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that –

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks (or 26 workweeks in the case of leave provided under subsection (a)(3) of this section), the additional weeks of leave necessary to attain the 12 workweeks (or 26 workweeks, as appropriate) of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), (C), or (E) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for leave provided under subsection (a)(3) of this section for any part of the 26-week period of such leave under such subsection, except that nothing in this subchapter requires an employer to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section or under subsection (a)(3) of this section is foreseeable based on planned medical treatment, the employee –

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, parent, or covered servicemember of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(3) Notice for leave due to covered active duty of family member

In any case in which the necessity for leave under subsection (a)(1)(E) of this section is foreseeable, whether because the spouse, or a son, daughter, or parent, of the employee is on covered active duty, or because of notification of an impending call or order to covered active duty, the employee shall provide such notice to the employer as is reasonable and practicable.

(f) Spouses employed by same employer

(1) In general

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken –

(A) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(B) to care for a sick parent under subparagraph (C) of such subsection.

(2) Servicemember family leave

(A) In general

The aggregate number of workweeks of leave to which both that husband and wife may be entitled under subsection (a) of this section may be limited to

26 workweeks during the single 12-month period described in subsection (a)(3) of this section if the leave is –

(i) leave under subsection (a)(3) of this section; or

(ii) a combination of leave under subsection (a)(3) of this section and leave described in paragraph (1).

(B) Both limitations applicable

If the leave taken by the husband and wife includes leave described in paragraph (1), the limitation in paragraph (1) shall apply to the leave described in paragraph (1).

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§ 2613. Certification

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of paragraph (1) or paragraph (3) of section 2612(a) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, or of the next of kin of an individual in the case of leave taken under such paragraph (3), as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states –

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion

in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

(f) Certification related to covered active duty or call to covered active duty

An employer may require that a request for leave under section 2612(a)(1)(E) of this title be supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation requiring such certification, the employee shall provide, in a timely manner, a copy of such certification to the employer.

§ 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to –

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the

employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if –

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of Title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee

under such group health plan during any period of unpaid leave under section 2612 of this title if –

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than –

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by –

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title;

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee

unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title; or

(iii) a certification issued by the health care provider of the servicemember being cared for by the employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(3) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

§ 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual –

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

§ 2616. Investigative authority

(a) In general

To ensure compliance with the provisions of this subchapter, or any regulation or order issued under this subchapter, the Secretary shall have, subject to subsection (c) of this section, the investigative authority provided under section 211(a) of this title.

(b) Obligation to keep and preserve records

Any employer shall make, keep, and preserve records pertaining to compliance with this subchapter in accordance with section 211(c) of this title and in accordance with regulations issued by the Secretary.

(c) Required submissions generally limited to annual basis

The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this subchapter or any regulation or order issued pursuant to this subchapter, or is investigating a charge pursuant to section 2617(b) of this title.

(d) Subpoena powers

For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 209 of this title.

§ 2617. Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected –

(A) for damages equal to –

(i) the amount of –

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 2612(a)(3) of this title) of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had

reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action

An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of –

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations

The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate –

(A) on the filing of a complaint by the Secretary in an action under subsection (d) of this section in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) of this section in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1),

unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by Secretary

(1) Administrative action

The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of this title.

(2) Civil action

The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A) of this section.

(3) Sums recovered

Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation

(1) In general

Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful violation

In the case of such action brought for a willful violation of section 2615 of this title, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(3) Commencement

In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for injunction by Secretary

The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary –

(1) to restrain violations of section 2615 of this title, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor

The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

(f) Government Accountability Office and Library of Congress

In the case of the Government Accountability Office and the Library of Congress, the authority of the Secretary of Labor under this subchapter shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

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§ 2618. Special rules concerning employees of local educational agencies

(a) Application

(1) In general

Except as otherwise provided in this section, the rights (including the rights under section 2614 of this title, which shall extend throughout the period of leave of any employee under this section), remedies, and procedures under this subchapter shall apply to –

(A) any "local educational agency" (as defined in section 7801 of Title 20) and an eligible employee of the agency; and

(B) any private elementary or secondary school and an eligible employee of the school.

(2) Definitions

For purposes of the application described in paragraph (1):

(A) Eligible employee

The term "eligible employee" means an eligible employee of an agency or school described in paragraph (1).

(B) Employer

The term "employer" means an agency or school described in paragraph (1).

(b) Leave does not violate certain other Federal laws

A local educational agency and a private elementary or secondary school shall not be in violation of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), section 794 of this title or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), solely as a result of an eligible employee of such agency or school exercising the rights of such employee under this subchapter.

(c) Intermittent leave or leave on reduced schedule for instructional employees

(1) In general

Subject to paragraph (2), in any case in which an eligible employee employed principally in an instructional capacity by any such educational agency or school requests leave under subparagraph (C) or (D) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title that is foreseeable based on planned medical treatment and the employee would be on leave for greater than 20 percent of the total number of working days in the period during which the leave would extend, the agency or school may require that such employee elect either –

(A) to take leave for periods of a particular duration, not to exceed the duration of the planned medical treatment; or

(B) to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified, and that –

(i) has equivalent pay and benefits; and

(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

(2) Application

The elections described in subparagraphs (A) and (B) of paragraph (1) shall apply only with respect to an eligible employee who complies with section 2612(e)(2) of this title.

(d) Rules applicable to periods near conclusion of academic term

The following rules shall apply with respect to periods of leave near the conclusion of an academic term in the case of any eligible employee employed principally in an instructional capacity by any such educational agency or school:

(1) Leave more than 5 weeks prior to end of term

If the eligible employee begins leave under section 2612 of this title more than 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if –

(A) the leave is of at least 3 weeks duration; and

(B) the return to employment would occur during the 3-week period before the end of such term.

(2) Leave less than 5 weeks prior to end of term

If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 2612(a)(1) of this title or under section 2612(a)(3) of this tile during the period that commences 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if –

(A) the leave is of greater than 2 weeks duration; and

(B) the return to employment would occur during the 2-week period before the end of such term.

(3) Leave less than 3 weeks prior to end of term

If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title during the period that commences 3 weeks prior to the end of the academic term and the duration of the leave is greater than 5 working days, the agency or school may require the employee to continue to take leave until the end of such term.

(e) Restoration to equivalent employment position

For purposes of determinations under section 2614(a)(1)(B) of this title (relating to the restoration of an eligible employee to an equivalent position), in the case of a local educational agency or a private elementary or secondary school, such determination shall be made on the basis of established school board

policies and practices, private school policies and practices, and collective bargaining agreements.

(f) Reduction of amount of liability

If a local educational agency or a private elementary or secondary school that has violated this subchapter proves to the satisfaction of the court that the agency, school, or department had reasonable grounds for believing that the underlying act or omission was not a violation of this subchapter, such court may, in the discretion of the court, reduce the amount of the liability provided for under section 2617(a)(1)(A) of this title to the amount and interest determined under clauses (i) and (ii), respectively, of such section.

---

§ 2619. Notice

(a) In general

Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge.

(b) Penalty

Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense.

Subchapter II. Commission on Leave

§ 2631. Establishment

There is established a commission to be known as the Commission on Leave (referred to in this subchapter as the "Commission").

---

§ 2632. Duties

The Commission shall –

(1) conduct a comprehensive study of –

(A) existing and proposed mandatory and voluntary policies relating to family and temporary medical leave, including policies provided by employers not covered under this Act;

(B) the potential costs, benefits, and impact on productivity, job creation and business growth of such policies on employers and employees;

(C) possible differences in costs, benefits, and impact on productivity, job creation and business growth of such policies on employers based on business type and size;

(D) the impact of family and medical leave policies on the availability of employee benefits provided by employers, including employers not covered under this Act;

(E) alternate and equivalent State enforcement of subchapter I of this chapter with respect to employees described in section 2618(a) of this title;

(F) methods used by employers to reduce administrative costs of implementing family and medical leave policies;

(G) the ability of the employers to recover, under section 2614(c)(2) of this title, the premiums described in such section; and

(H) the impact on employers and employees of policies that provide temporary wage replacement during periods of family and medical leave.

(2) not later than 2 years after the date on which the Commission first meets, prepare and submit, to the appropriate Committees of Congress, a report concerning the subjects listed in paragraph (1).

---

§ 2633. Membership

(a) Composition

(1) Appointments

The Commission shall be composed of 12 voting members and 4 ex officio members to be appointed not later than 60 days after February 5, 1993, as follows:

(A) Senators

One Senator shall be appointed by the Majority Leader of the Senate, and one Senator shall be appointed by the Minority Leader of the Senate.

(B) Members of House of Representatives

One Member of the House of Representatives shall be appointed by the Speaker of the House of Representatives, and one Member of the House of Representatives shall be appointed by the Minority Leader of the House of Representatives.

(C) Additional members

(i) Appointment

Two members each shall be appointed by –

(I) the Speaker of the House of Representatives;

(II) the Majority Leader of the Senate;

(III) the Minority Leader of the House of Representatives; and

(IV) the Minority Leader of the Senate.

(ii) Expertise

Such members shall be appointed by virtue of demonstrated expertise in relevant family, temporary disability, and labor management issues. Such members shall include representatives of employers, including employers from large businesses and from small businesses.

(2) Ex officio members

The Secretary of Health and Human Services, the Secretary of Labor, the Secretary of Commerce, and the Administrator of the Small Business Administration

shall serve on the Commission as nonvoting ex officio members.

(b) Vacancies

Any vacancy on the Commission shall be filled in the manner in which the original appointment was made. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(c) Chairperson and vice chairperson

The Commission shall elect a chairperson and a vice chairperson from among the members of the Commission.

(d) Quorum

Eight members of the Commission shall constitute a quorum for all purposes, except that a lesser number may constitute a quorum for the purpose of holding hearings.

---

§ 2634. Compensation

(a) Pay

Members of the Commission shall serve without compensation.

(b) Travel expenses

Members of the Commission shall be allowed reasonable travel expenses, including a per diem allowance, in accordance with section 5703 of Title 5 when performing duties of the Commission.

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§ 2635. Powers

(a) Meetings

The Commission shall first meet not later than 30 days after the date on which all members are appointed, and the Commission shall meet thereafter on the call of the chairperson or a majority of the members.

(b) Hearings and sessions

The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate. The Commission may administer oaths or affirmations to witnesses appearing before it.

(c) Access to information

The Commission may secure directly from any Federal agency information necessary to enable it to carry out this subchapter, if the information may be disclosed under section 552 of Title 5. Subject to the previous sentence, on the request of the chairperson or vice chairperson of the Commission, the head of such agency shall furnish such information to the Commission.

(d) Use of facilities and services

Upon the request of the Commission, the head of any Federal agency may make available to the Commission any of the facilities and services of such agency.

(e) Personnel from other agencies

On the request of the Commission, the head of any Federal agency may detail any of the personnel of such agency to serve as an Executive Director of the Commission or assist the Commission in carrying out the duties of the Commission. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(f) Voluntary service

Notwithstanding section 1342 of Title 31, the chairperson of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

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§ 2636. Termination

The Commission shall terminate 30 days after the date of the submission of the report of the Commission to Congress.

Subchapter III. Miscellaneous Provisions

§ 2651. Effect on other laws

(a) Federal and State antidiscrimination laws

Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) State and local laws

Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

---

§ 2652. Effect on existing employment benefits.

(a) More protective

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less protective

The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

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§ 2653. Encouragement of more generous leave policies

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous

than any policies that comply with the requirements under this Act or any amendment made by this Act.

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§ 2654. Regulations

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

Current through P.L. 112-28 approved 8-12-11

RESPONDENT'S BRIEF

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No. 10-1016

In The Supreme Court of the United States

DANIEL COLEMAN,

Petitioner,

v.

MARYLAND COURT OF APPEALS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Do the states retain sovereign immunity from claims for money damages based on alleged violations of the "self-care" provision of the Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(D)?

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STATEMENT OF THE CASE

1. Congress enacted the Family and Medical Leave Act (FMLA) in 1993. Pub. L. No. 103-3, 107 Stat. 6. Congress stated several purposes to be accomplished by the Act, including "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity," 29 U.S.C. § 2601(b)(1), while doing so "in a manner that accommodates the legitimate interests of employers," § 2601(b)(3), and "that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex," § 2601(b)(4), and "promote[s] the goal of equal employment opportunity for women and men, pursuant to such clause," § 2601(b)(5).

Congress found that "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting" and that there was "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(2), (3). Congress also found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5).

Congress also recognized that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. § 2601(a)(6). Accordingly, in authorizing measures to address the economic insecurity created by inadequate leave policies, and to counteract gender stereotypes about the role of men and women as caregivers, Congress acted to regulate employee leave policies "in a manner that . . . minimizes the potential for employment discrimination on the basis of sex" by ensuring that leave is available "on a gender-neutral basis." 29 U.S.C. § 2601(b)(4).

As originally enacted, the FMLA authorized qualified employees to take up to 12 weeks of unpaid leave annually in four circumstances, three of which concern caring for family members: bearing and caring for a child, 29 U.S.C. § 2612(a)(1)(A), adopting or providing foster care for a child, § 2612(a)(1)(B), and caring for a spouse, child, or parent with a serious health condition, § 2612(a)(1)(C). The fourth circumstance, and the one at issue here, involves the employee's own health; leave is authorized under this "self-care" provision when "a serious health condition . . . makes the employee unable to perform the functions" of his or her job. § 2612(a)(1)(D). More recently, Congress has amended the FMLA to authorize leave because of an exigency arising from a relative's service in the military. *See* 29 U.S.C. § 2612(a)(1)(E); Pub. L. No. 110-181, § 585, 122 Stat. *33, 129 (2008).*

The FMLA creates a private right of action permitting an employee to sue an employer for injunctive relief or money damages if the employer has denied the employee rights afforded under the FMLA. *See* 29 U.S.C. §§ 2615(a), 2617(a). The Secretary of Labor may also conduct investigations and bring civil actions to enforce the FMLA. *See* 29 U.S.C. § 2617(b), (d).

2. Petitioner Daniel Coleman, an African-American male, was employed by the Administrative Office of the Courts for the Maryland judiciary, where he was responsible for matters related to contract administration and procurement. J.A. 5; Pet. App. 5. Respondents Frank Broccolina and Larry Jones are employees of the Administrative Office of the Courts. J.A. 5-6; Pet. App. 15. The third Respondent is Maryland's highest court, the Court of Appeals, whose Chief Judge is responsible for supervising the administrative operations of the State's court system. *See* Md. Code Ann., Cts. & Jud. Proc. § 13-101.

In August 2007, Mr. Coleman was terminated from his employment. J.A. 10; Pet. App. 3. According to his amended complaint, his termination was preceded by an internal investigation begun in 2005, a reprimand in April 2007, and the Chief Judge's rejection of Mr. Coleman's appeal of that reprimand. J.A. 5, 9-10; Pet. App. 17 n.2. Mr. Coleman alleges that, on August 2, 2007, he "sent a request for sick leave" to Mr. Broccolina for a "documented illness"

that would require him to miss work for ten days.[1] J.A. 10; Pet. App. 3, 16. He further alleges that, on August 3, Mr. Broccolina contacted Mr. Coleman to inform him that he was being offered the choice of being terminated immediately or taking 30 days administrative leave and then resigning. J.A. 10; Pet. App. 3, 16-17.[2]

3. On September 19, 2008, Mr. Coleman initiated this action in the United States District Court for the District of Maryland. Pet. App. 3.[3] His complaint, as later amended, named the respondents as defendants, and alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and

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[1] In his brief, Mr. Coleman elaborates on the nature of this "documented illness" by asserting that it "appears to have been a 'serious health condition' as it is defined by the FMLA." Pet'r Brief 7. Nothing in the complaint or the other materials Mr. Coleman submitted to the district court substantiates this assertion. *See* 29 U.S.C. § 2611(11) (defining term); 29 C.F.R. §§ 825.113—825.115 (same).

[2] Mr. Coleman's original complaint and other documents submitted to the district court give August 2 as the date of his conversation with Mr. Broccolina, as well as the day when he allegedly was placed under a doctor's care. Dist. Ct. Docket, Paper No. 1 ¶¶ 30-32; Ct. App. J.A. 18, 38, 44, 51-52.

[3] As noted in the respondents' brief in opposition to Mr. Coleman's petition, Brief in Opp. 3-4 & n.2, 22-23 & n.7, Mr. Coleman also brought the same claims against the same respondents in State court, where they were resolved in the respondents' favor in a final judgment that would be given preclusive effect in any further proceedings in this case.

the FMLA; it also asserted a state-law defamation claim. J.A. 3-13; Pet. App. 3-4 & n.1. Mr. Coleman claimed that he was fired because of his race and, alternatively, because he had requested sick leave; he also alleged that Mr. Jones and Mr. Broccolina had falsely accused him of having abused his position to steer procurement contracts and that these accusations also played a role in his termination. J.A. 6-8; Pet. App. 3. The complaint also alleged that the letter of reprimand he had received in April 2007 was issued because of his race. J.A. 10; Pet. App. 7 n.2. The respondents moved to dismiss the complaint and amended complaint under Rule 12(b).

4. The district court granted the respondents' motion on May 7, 2009. Pet. App. 20. The court held that Mr. Coleman had failed to state a claim under Title VII, because his complaint was "devoid of any facts from which to infer race-based discrimination." *Id.* at 16. With respect to the FMLA claim, the court determined that the leave that Mr. Coleman had sought was "'self-care' because Mr. Coleman was seeking leave to care for his own illness, rather than 'family-care' to care for a family member." *Id.* The court held that this claim under the self-care provision of the FMLA, 29 U.S.C. § 2612(a)(1)(D), was barred by the State's sovereign immunity, and observed that this holding was in accord with the "universal agreement of the Federal Courts of Appeals that have considered the issue," all of which had concluded that Congress had not "abrogated state sovereign immunity with respect to the FMLA's self-care provision." Pet. App. 17. The district court

also dismissed Mr. Coleman's state-law defamation claim. *Id.* at 19-20.

5. Mr. Coleman appealed the district court's dismissal of his Title VII and FMLA claims, and the United States Court of Appeals for the Fourth Circuit affirmed. With respect to the Title VII claim, the court of appeals agreed with the district court that Mr. Coleman's complaint did not "establish a plausible basis for believing" that he had been treated differently from similarly situated employees or that race was the true basis for his termination. Pet. App. 6-7. The court therefore affirmed the dismissal of Mr. Coleman's Title VII claim.

The court of appeals also agreed that Mr. Coleman's self-care leave claim under the FMLA was barred by the State's sovereign immunity. In analyzing this issue, the court declined to rely on circuit precedent that had held that the Eleventh Amendment bar applies to all FMLA claims, *see Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001), because the court recognized that the reasoning of that decision is "no longer valid in light of" this Court's decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). Pet. App. 11 n.4. Accordingly, the court of appeals proceeded to examine the Eleventh Amendment question by applying the *Hibbs* analytical framework to the FMLA's self-care provision. Pet. App. 8-14.

The court of appeals observed that "*Hibbs* concerned only [the FMLA's] family-care provision," 29 U.S.C. § 2612(a)(1)(C), and its "gender-related

nature," and therefore "did not discuss whether Congress validly abrogated states' immunity with regard to the self-care provision, § 2612(a)(1)(D)." Pet. App. 11. Examining the legislative history of the statute, the court of appeals concluded that "preventing gender discrimination was not a significant motivation for Congress in including the self-care provision"; rather, that provision had been enacted to "alleviate the economic effect" of job loss due to sickness and to "protect employees from being discriminated against because of their serious health problems." *Id.* at 12. The court of appeals also observed that the legislative record did not establish that "states as employers [had been] discriminating on the basis of gender in granting leave for personal reasons." *Id.* Based on these observations, the court held that the self-care provision "cannot pass the congruence-and-proportionality test" that this Court has articulated in its cases addressing congressional authority, under Section 5 of the Fourteenth Amendment, to abrogate the states' sovereign immunity. *Id.*

SUMMARY OF THE ARGUMENT

In *Hibbs*, this Court addressed a single provision of the FMLA, relating to employee leave taken for the purpose of caring for a family member. Applying the analysis established in this Court's precedents, the Court determined that the family-care provision constituted "appropriate legislation" validly abrogating the states' sovereign immunity under

Section 5 of the Fourteenth Amendment, because that provision was Congress's "narrowly targeted" response to a record of states' "unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits." 538 U.S. at 738, 735. This case concerns a different provision of the FMLA, one that requires employers to provide a minimum amount of self-care leave to both men and women employees; as with the family-care provision, the FMLA purports to abrogate states' sovereign immunity from damages suits arising from violations of the self-care provision. The governing principles recognized by this Court's precedents demand that the self-care provision be examined separately, just as the Court did in examining the family-care provision in *Hibbs*, to determine if the self-care provision also constitutes "appropriate legislation" authorized by Section 5.

The legislative history demonstrates that, unlike the family-care provision reviewed in *Hibbs*, the self-care provision was not enacted in response to a record of gender discrimination by states, but was instead motivated by economic policy objectives that are distinct from the substantive rights guaranteed by Section 1 of the Fourteenth Amendment. The legislative record lacks the evidence of state constitutional violations with respect to the administration of self-care leave that is needed to justify the exercise of Congress's remedial powers under Section 5 of the Amendment. Absent that evidence, the self-care provision cannot satisfy the essential requirement that "appropriate legislation" be congruent and proportional to the harm that

Congress seeks to remedy. Consequently, Congress has not validly abrogated the states' sovereign immunity from damages claims based on the self-care provision.

ARGUMENT

I. THE FMLA'S SELF-CARE PROVISION DOES NOT SATISFY THIS COURT'S CONGRUENCE-AND-PROPORTIONALITY TEST FOR "APPROPRIATE" LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

The court of appeals correctly dismissed Mr. Coleman's damages claim against the State of Maryland's highest court and two of its officers upon concluding—consistent with the unanimous view of the five other courts of appeals to consider the issue following this Court's decision in *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721 (2003)—that Congress's authorization of private suits for money damages against states for alleged violations of the FMLA's self-care provision does not satisfy this Court's established test for a valid abrogation of state sovereign immunity. Pet. App. 14; *accord Nelson v. University of Texas*, 535 F.3d 318, 321 (5th Cir. 2008); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007); *Toeller v. Wisconsin Dep't of Corr.*, 461 F.3d 871, 879 (7th Cir. 2006); *Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 422 F.3d 392, 402 (6th Cir. 2005); *Brockman v. Wyoming Dep't of Family Servs.*, 342 F.3d 1159, 1164-65 (10th Cir. 2003).

The test that this Court and the lower courts have consistently applied since *City of Boerne v. Flores*, 521 U.S. 507 (1997), rests on important limitations that this Court has discerned in the text and context of the Fourteenth Amendment. Though Section 5 of the Fourteenth Amendment authorizes Congress to enact "appropriate legislation" to "enforce" the due process and equal protection guarantees contained in Section 1 of the Amendment, this Court's precedent recognizes that the Section 5 authorization is limited by "vital principles" that are necessary to preserve "the federal balance" and "maintain separation of powers." *City of Boerne*, 521 U.S. at 536.

The first of these limiting principles "inherent in § 5's text and constitutional context" is "necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *United States v. Morrison*, 529 U.S. 598, 619, 620 (2000) (citing *City of Boerne*, 521 U.S. at 520-24). In preserving this federal balance, the states' sovereign immunity, as expressed in the Eleventh Amendment, continues to serve an essential role. Though " 'necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment,' " the Eleventh Amendment still " 'restricts the judicial power under Article III' " and precludes Congress from exercising its powers under Article I " 'to circumvent the constitutional limitations placed upon federal jurisdiction.' " *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 364 (2001) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976);

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72-73 (1996)).

The second "vital principle" recognized in *City of Boerne* and cases following it emphasizes that Section 5 gives Congress only "the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne*, 521 U.S. at 519. Instead, "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees." *Garrett*, 531 U.S. at 365. Accordingly, to be "appropriate legislation" within the meaning of Section 5, measures adopted by Congress "may not work a 'substantive change in the governing law.'" *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (quoting *City of Boerne*, 521 U.S. at 519).

To safeguard these vital principles and prevent purportedly remedial legislation from "becom[ing] substantive in operation and effect," *City of Boerne*, 521 U.S. at 520, this Court has established a three-step test to determine whether a statutory provision enacted under Congress's Section 5 power is "appropriate" legislation to enforce the Fourteenth Amendment's provisions. *See Hibbs*, 538 U.S. at 728 ("We distinguish appropriate prophylactic legislation from 'substantive redefinition of the Fourteenth Amendment right at issue' by applying the test set forth in *City of Boerne*." (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000))).

"The first step in applying these now familiar principles is to identify with some precision the scope of the constitutional right at issue" to determine its

"metes and bounds." *Garrett*, 531 U.S. at 365, 368; *see also Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999) ("[W]e must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.' " (quoting *City of Boerne*, 521 U.S. at 525)); *see also Lane*, 541 U.S. at 522 ("The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce when it enacted" the statutory provision.). To identify the precise scope of the constitutional right Congress was purporting to enforce in the statutory provision invoked by a plaintiff, the Court "looks to [its] prior decisions" to "examine the limitations that § 1 of the Fourteenth Amendment places upon States' treatment" of the classification of those who are covered by the provision. *Garrett*, 531 U.S. at 365.

Next, the Court will "examine whether Congress identified a history and pattern of unconstitutional [conduct] by the States" toward the specified classification of persons, *id.* at 368—that is, "evidence of a pattern of constitutional violations on the part of the States *in this area*," as identified in the first step of the analysis, *Hibbs*, 538 U.S. at 729 (emphasis added). Because "Congress' § 5 authority is appropriately exercised only in response to state transgressions," *Garrett*, 531 U.S. at 365, this second step of the *City of Boerne* test demands evidence in the legislative record showing that the States engaged in a pattern of violating the specified

constitutional right. The need for "evidence of constitutional violations *by the States themselves* is particularly important when," as in this case, Section 5 legislation purports to abrogate sovereign immunity "to place the States on equal footing with private actors with respect to amenability to suit." *Lane*, 541 U.S. at 527 (emphasis added). "[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination *by the States* which violates the Fourteenth Amendment. . . ." *Garrett*, 531 U.S. at 374 (emphasis added); *see also id.* at 376 (Kennedy, J., concurring).

This Court's decisions further circumscribe the nature of evidence that may be deemed material in this part of the analysis. Thus, the second step of the *City of Boerne* test cannot be satisfied by evidence or assertions that State policies and actions have had a "disparate impact" on a particular class of persons, because "such evidence alone is insufficient" to establish a constitutional violation, "even where the Fourteenth Amendment subjects state action to strict scrutiny." *Garrett*, 531 U.S. at 373 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). Moreover, if the constitutional right identified in the first step of the *City of Boerne* test is not one that implicates heightened scrutiny, then, "in order to impugn the constitutionality of state discrimination" or other state conduct, "Congress must identify, not just the existence of . . . state decisions [based on suspect criteria], but a 'wide-spread pattern' of *irrational* reliance on such criteria." *Hibbs*, 538 U.S.

at 735 (quoting *Kimel*, 528 U.S. at 90) (emphasis added).

Finally, in the third step of the *City of Boerne* test, the Court asks whether the statutory provision invoked by the plaintiff, and, more specifically, "the manner in which the legislation operates to enforce th[e] guarantee" identified in the first step of the analysis, constitute "an appropriate response to this history and pattern of [unconstitutional] treatment" by the States, as documented in the legislative record. *Lane*, 541 U.S. at 530 & n.18. That is, to satisfy the third part of the test, Congress "must tailor its legislative scheme to remedying or preventing" the identified pattern of State "conduct transgressing the Fourteenth Amendment's substantive provisions," to achieve " 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Florida Prepaid*, 527 U.S. at 639 (quoting *City of Boerne*, 521 U.S. at 520).

A. The "Precise Scope of the Constitutional Right at Issue" Here Is an Equal Protection Right to Be Free from Irrational State Employment Discrimination Based on a Medical Condition.

In applying the first part of the *City of Boerne* test to the self-care provision of the FMLA on which Mr. Coleman bases his damages claim, federal appellate courts have identified two interests that Congress sought to address, neither of which implicates heightened scrutiny under this Court's Fourteenth Amendment jurisprudence. Unlike the FMLA family-

care provision reviewed in *Hibbs*, the self-care provision was not "intended to remedy gender-based discrimination. . . ." *Touvell*, 422 F.3d at 401; *see* Pet. App. 12 (same); *Brockman*, 342 F.3d at 1164 (same). Instead, "the legislative history accompanying the passage of the FMLA reveals two motivations for the inclusion of the self-care provision": (1) "Congress was attempting to alleviate the economic burdens to both the employee and . . . his or her family of illness-related job-loss," and (2) "Congress was attempting to prevent those with serious health problems from being discriminated against by their employers." *Brockman*, 342 F.3d at 1164 (citing S. Rep. No. 103-3, at 11, 12 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 13-14; H.R. Rep. No. 101-28(I), at 23 (1989)); *see* Pet. App. 13 (same); *Touvell*, 422 F.3d at 401 (same).

When examined in light of this Court's applicable decisions, these two expressed purposes themselves make it difficult to view the self-care provision as "appropriate legislation" under Section 5 of the Fourteenth Amendment. As to the first motivation for the self-care provision, members of Congress understood that the measure's "fundamental rationale" was to advance a quintessentially economic policy objective: to prevent "[j]ob loss because of illness," which "has a particularly devastating effect on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads a household." S. Rep. No. 103-3, at 11; *see* H.R. Rep. No. 101-28(I), at 23 (1989) ("The temporary medical leave requirement is intended to provide basic, humane protection to the family unit when it is most in need of help" and to

"reduce the societal cost born[e] by government and private charity."). As the courts of appeals have observed, this intent to ameliorate the economic consequences of serious illness "clearly goes to Congress's power under the Commerce Clause and not Section 5" of the Fourteenth Amendment. *Touvell*, 422 F.3d at 401 (quoting *Laro v. New Hampshire*, 259 F.3d 1, 12 (1st Cir. 2001)). Unlike Section 5, neither the Commerce Clause nor any other provision of Article I authorizes Congress to abrogate the States' sovereign immunity. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 79.[4]

The second interest that motivated Congress in enacting the self-care provision—to prevent "discrimination against qualified employees" with serious health problems, S. Rep. No. 103-3, at 12—is one that falls within the purview of the Fourteenth Amendment and, thus, Congress's power to "enforce" the rights guaranteed by that Amendment. However, this Court has never subjected this form of "discrimination" to heightened scrutiny, but has determined instead that it should be evaluated under

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[4] In enacting the FMLA, Congress invoked its power under the Commerce Clause, as well as its enforcement power under the Fourteenth Amendment, but did not specify which provisions of the statute served merely to regulate interstate commerce and which provisions served the additional purpose of enforcing constitutional rights. *See* S. Rep. No. 103-3, at 16; H.R. Rep. No. 103-8(I), at 29.

rational-basis review. This Court has declined to treat "the disabled, the mentally ill, and the infirm" as "quasi-suspect" classifications, and has rejected equal protection challenges to government policies that discriminate on the basis of disability, unless that discrimination can be said to be irrational. *See Garrett*, 531 U.S. at 366-67 (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445-46 (1985)). Under this precedent, "States are not required to make special accommodations for the disabled, so long as their actions towards such individuals are rational"; thus, "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Garrett*, 531 U.S. at 367-68; *see also id.* at 366-67 ("[W]here a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation." (quoting *Cleburne*, 473 U.S. at 441)).

Thus, the precise constitutional right that Congress purported to address in the self-care provision is the right to be free from *irrational* employment discrimination by states based on a serious medical condition.

B. Congress Did Not Act on a Record of Unconstitutional Conduct by States in the Granting of Medical Leave, and the Self-Care Provision Was Adopted for Socioeconomic Reasons, Not to Combat Gender Stereotypes.

1. Because the right addressed by the self-care provision—to be free from irrational employment discrimination on the basis of a health condition—is not subject to heightened scrutiny, this Court's precedents applying the *City of Boerne* test insist that the legislative record supporting enactment of the self-care provision must satisfy a demanding standard: "Congress must identify, not just the existence of . . . state decisions [based on suspect criteria], but a '*wide-spread pattern*' of *irrational* reliance on such criteria." *Hibbs*, 538 U.S. at 735 (quoting *Kimel*, 528 U.S. at 90) (emphasis added). Yet the legislative record here contains no evidence of irrational discrimination by the states with respect to employees with medical conditions. *See Brockman*, 342 F.3d at 1164 ("The legislative history does not . . . identify as the basis for [the self-care provision] a link between these two motivations" expressed in the Senate and House reports, "and any pattern of discriminatory stereotyping on the part of the states as employers."). Mr. Coleman is unable to cite even one mention in the legislative record of irrational discrimination in the administration of state-employee medical-leave policies that would be addressed by the self-care provision.

Even if one were to assume, as Mr. Coleman contends,[5] that the self-care provision was intended to address gender discrimination, the courts of appeals that have considered the contention have unanimously found that "Congress did not adduce any evidence establishing a pattern of the states as employers discriminating on the basis of gender in granting leave for personal reasons." Pet. App. 12; *see Touvell*, 422 F.3d at 402 (finding "no evidence

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[5] Though Mr. Coleman attempts to characterize the self-care provision as a gender discrimination remedy based on its coverage of "female-specific" medical conditions, including "maternity related disability," Pet'r Brief 37 (quoting 29 U.S.C. § 2601(b)(4)), Congress merely made the rational choice to include pregnancy-related conditions among a number of health conditions that "meet the general test" and, therefore, merit protection against job loss, including some conditions that may be more likely to affect men:

> [S]erious health conditions include but are not limited to heart attacks, heart conditions . . . , most cancers, back conditions . . . , strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth. *All of these conditions meet the general test* that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery.

H.R. Rep. No. 103-8(I), at 40 (1993) (emphasis added).

that the states engaged in . . . gender discrimination with regard to personal medical leave" and "no evidence that the self-care provision of the Act would have any remedial or prophylactic effect on the [gender] discrimination identified by Congress" with respect to the FMLA's family-care leave provision); *Nelson*, 535 F.3d at 321 (finding the self-care provision "does not appear to be in response to any nationwide history of gender discrimination that would permit Congress to act under § 5"). Like those appellate courts, Mr. Coleman cannot locate any evidence in the legislative record to suggest that the states have engaged in discrimination with regard to employee medical leave for self-care.

The lower courts' inability to find any evidence of a pattern of state employment discrimination with respect to self-care leave is consistent with this Court's own assessment of the FMLA's legislative record. *See Lane*, 541 U.S. at 527 n.16 (observing that the legislative history of the FMLA, including parts pertaining to the family-care provision reviewed in *Hibbs*, "in fact contained *little specific evidence of a pattern of unconstitutional discrimination on the part of the States*," and "the evidence before the Congress that enacted the FMLA related primarily to the practices of private-sector employers and the Federal Government" (emphasis added) (citing *Hibbs*, 538 U.S. at 745–50 (Kennedy, J., dissenting))).

Indeed, to the extent Congress had before it evidence of how personal medical leave policies affected women and men, that evidence tended to

show even-handedness rather than disparate treatment. For example, the FMLA's legislative history contains evidence that men and women took roughly equal amounts of self-care leave:

> Recent studies provided to the [House Education and Labor] Committee indicate that men and women are out on medical leave approximately equally. . . . The evidence also suggests that the incidence of serious medical conditions that would be covered by medical leave under the bill is *virtually the same for men and women.*

H.R. Rep. No. 101-28(I), at 15 (1989) (emphasis added).

2. Mr. Coleman also tries to generate a connection to gender discrimination by referring to testimony that focused on private-sector employers, rather than state governments, and that suggested a guaranteed period of pregnancy-disability leave was essential because the Pregnancy Discrimination Act had proved to be an inadequate remedy for the problems faced by pregnant women in the workplace. Pet'r Brief 39 ("Congress heard testimony from women who lost their jobs because of pregnancy and child-birth related leave, notwithstanding the protections provided by the Pregnancy Discrimination Act.").

In rejecting the same contention, the Sixth Circuit identified "several problems with this argument," including: (1) "there is no evidence that Congress was any more concerned when enacting the FMLA with providing leave benefits to pregnant women than with providing benefits for other seriously ill men and

women"; (2) "even if it was true that the self-care provision of the Act was necessary in order to ensure that women can take time off for pregnancy-related conditions without creating an incentive to hire and promote men, there is no evidence that such a goal . . . is designed to combat a pattern of discrimination by state employers"; (3) "even if the provision of leave for pregnancy-related conditions was designed to remedy or prevent discrimination by public employers, there is no reason to believe that the self-care provision of the FMLA would in fact remove any disincentive to hire women that might otherwise result from a pregnancy-specific provision"; (4) "[w]ith regard to self-care leave, . . . there is no evidence that women—either in fact or in stereotype—took more such leave prior to the enactment of the FMLA"; (5) "there is no evidence that personal medical leave had ever created a disincentive to hire women"; and (6) "if such beliefs and the consequent disincentives *had* existed pre-FMLA, the self-care provision of the Act would only make things worse," because, "if employers believe[d] that women were more likely to take personal leave than men, a law mandating the provision of such leave to all employees would create precisely the type of incentives to hire and promote men that the family-care provision of the Act was designed to prevent." *Touvell*, 422 F.3d at 404-05; *see Laro*, 259 F.3d at 13-16 (rejecting the same argument on similar grounds).

The record that Congress actually had before it shows that the perceived inadequacy of the Pregnancy Discrimination Act was *not* that it had failed to provide a meaningful remedy against

unlawful or unconstitutional discrimination, but that it did not contain an affirmative substantive entitlement to leave time. The legislative record explicitly identified the self-care provision's purpose to be affording a substantive entitlement to an employee benefit, rather than remedying unconstitutional discrimination. That is, Congress understood that the FMLA "is intended to fill those gaps" left by the Pregnancy Discrimination Act with respect to the provision of benefits *"which an anti-discrimination law by its nature cannot fill."* H.R. Rep. No. 103-8(II), at 11 (1993) (emphasis added).

The perceived shortcoming of the Pregnancy Discrimination Act was that an employer could deny leave for a pregnancy-related health condition without discriminating (and thus avoid violating Title VII, as amended by the Pregnancy Discrimination Act) *if that employer did not offer disability leave at all.* The legislative record did not demonstrate that states maintained such restrictive leave policies.

In any case, references in the legislative record suggesting that Congress found one of its previous enactments inadequate are a far cry from the requisite evidence of constitutional violations by states. Before the FMLA was enacted, it was well established that a state's refusal to provide pregnancy leave to its employees was not unconstitutional. *See Geduldig v. Aiello,* 417 U.S. 484, 495 (1974).

3. Nor is there any validity to Mr. Coleman's attempt to equate an alleged lack of progress in the

adoption of state legislation with a finding of constitutional violations by states. *See* Pet'r Brief 49 (quoting statement in a House report that purported to refute the suggestion "that many States have already passed such leave benefits as are contained in [the proposed legislation]").[6] Notably, one of the supposed deficiencies in state laws was that they did not impose requirements for particular forms of leave on private-sector employers, not that the states failed to provide those forms of leave to their own employees. Pet'r Brief 49; *see also id.* at 38 (quoting testimony about the leave provided by "companies"). As Justice Kennedy explained in *Garrett*, because "States act as neutral entities, ready to take instruction and to enact laws when their citizens so demand," the mere "failure of a State to revise policies now seen as incorrect" in light of "a new commitment to better treatment of those disadvantaged by mental or physical impairments does *not* establish that an absence of state statutory correctives was a constitutional violation." 531 U.S. at 375 (Kennedy, J., concurring).

Despite the voluminous legislative record amassed during the years leading to the passage of the FMLA, that record lacks the essential evidence of state

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[6] As Mr. Coleman acknowledges, the basis for the claim that state leave policies were inadequate was a study that expressly excluded from its scope "state civil service regulations [that] provide additional coverage for state employees." Pet'r Brief 50. The policies that this study ignored are the source of *most* benefits for state employees.

constitutional violations that is necessary for the FMLA's self-care provision to qualify as "appropriate legislation" under Section 5.

C. A Substantive Entitlement to Take up to 12 Weeks of Self-Care Leave Annually Far Exceeds Any Congruent and Proportional Remedial Measure.

1. Because "Congress did not adduce any evidence establishing a pattern of the states as employers discriminating on the basis of gender in granting leave for personal reasons," the court of appeals below joined other Circuits in concluding that there has been no "showing that the self-care provision is congruent and proportional to a Fourteenth Amendment injury that Congress enacted the provision to remedy." Pet. App. 12; *see Touvell*, 422 F.3d at 403 ("In the absence of any evidence of discrimination relating to personal medical leave, the self-care provision of the FMLA cannot be justified as a remedy for that type of medical leave."); *Laro*, 259 F.3d at 16 ("Here, there is no identified link between this particular provision and any pattern of discriminatory stereotyping on the part of states as employers. On this record, the personal medical-leave provision of the FMLA does not exhibit a sufficient congruence to the prevention of unconstitutional state discrimination to validly abrogate the states' Eleventh Amendment immunity. Without more, then, these legislative responses are out of proportion to the preventive objective as to states as employers and cannot be understood to be designed to prevent unconstitutional behavior.").

These conclusions by the appellate courts are similar to those reached by this Court in *Florida Prepaid* and *Kimel*, where the second step of the *City of Boerne* analysis disclosed little or no evidence of state constitutional violations, and thereby effectively determined the outcome of the "congruence and proportionality" analysis in the third step of the test. *See Florida Prepaid*, 527 U.S. at 646 ("Because of this lack" of "a history of 'wide-spread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation," the "provisions of the Patent Remedy Act are 'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" (quoting *City of Boerne*, 521 U.S. at 526, 532)); *Kimel*, 528 U.S. at 91 ("Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.").

2. The attempt to abrogate state sovereign immunity through a damages action enforceable by a state employee who allegedly has been denied self-care leave is a quintessential example of Congress relying on Section 5 to advance a substantive policy, rather than a remedial purpose. *See City of Boerne*, 521 U.S. at 527 ("Any suggestion that Congress has a substantive, nonremedial power under the Fourteenth Amendment is not supported by our case law."). In providing for as much as 12 weeks of leave annually for a serious health condition to all employees, public and private, Congress was

conferring a substantive entitlement, and a sizeable one. Exposing state treasuries to liability for judgments based on claims of violations of the medical-leave requirement is a remedy that is grossly "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." *Kimel*, 528 U.S. at 83.

3. Mr. Coleman attempts to escape application of the congruence-and-proportionality test or to deny the unavoidable consequence of that test's application to the self-care provision, in two ways. Neither has merit.

a. First, Mr. Coleman seeks to paint the self-care provision as an integral component of a unitary remedial scheme—as one "leg" of a "four-legged" table. Pet'r Brief 10. Mr. Coleman asserts that the power to abrogate state sovereign immunity with respect to one provision of a statute must extend to the others. But while all four legs of Mr. Coleman's table (plus the fifth—the provision for leave based on a relative's military service, which Mr. Coleman apparently concedes cannot support abrogation of state sovereign immunity, Pet'r Brief 55)—involve workplace leave benefits, only three relate to the Section 5 objective of combating gender stereotypes about women's domestic roles, including the stereotype that only women were responsible for family caregiving. *See Hibbs*, 538 U.S. at 736-38; *see also id.* at 731 n.5 (recognizing "common foundation" for family-leave and parenting-leave provisions). By contrast, many—indeed most—instances of self-care leave do not implicate gender stereotypes at all.

Authorizing actions for money damages against state employers when an employee alleges he or she was wrongfully denied self-care leave for chronic migraine headaches, *see* 29 C.F.R. § 825.113(d), will not serve to deter sex discrimination or eliminate gender stereotypes.

Moreover, Mr. Coleman's all-or-nothing argument for abrogation depends on a conception of the FMLA "as a whole [that] is greater than the sum of its component parts." Pet'r Brief 10. But if congruence and proportionality are to mean anything, they must mean that the contours of the right being enforced bear some resemblance to the shape of the remedy, and the extent of the remedy must bear some reasonable relation to the degree of the right's infringement. This Court found that resemblance in shape and size when examining the remedy created by the family-leave provision. When, however, the remedy is broadened to include self-care leave, the resemblance is lost. To borrow a metaphor sometimes invoked in the legislative process, an ornament that exhibits congruence and proportionality will justify abrogation, whereas the Christmas tree on which it is hung will not. Congress should not be inhibited from including in the same enactment provisions that are authorized by one or more of the enumerated powers in Article I, together with provisions that are authorized by Congress's power under Section 5 of the Fourteenth Amendment. Yet Mr. Coleman's all-or-nothing approach to abrogation would either produce that result or render the *City of Boerne* test meaningless.

Finally, Mr. Coleman's aversion to "pars[ing]" provisions of the FMLA, Pet'r Brief 54, is inconsistent with this Court's jurisprudence and with the considered position of the United States Solicitor General. In both cases that have upheld abrogation and ones that have invalidated it, this Court has considered different parts of statutes separately in analyzing whether they constituted "appropriate" Section 5 legislation. Thus, in *Garrett*, this Court examined Title I of the ADA and found that it did not meet the *City of Boerne* test, whereas in *Lane*, this Court held that Title II of the same statute, at least in some of its applications, did support abrogation. *See also Lane*, 541 U.S. at 530-31 ("[N]othing in our case law requires us to consider Title II" of the ADA "as an undifferentiated whole."). Indeed, in *Hibbs*, this Court carefully (and appropriately) limited its analysis to a single provision of the FMLA, the family-care leave provision. In upholding abrogation with respect to that provision, this Court vindicated the position advanced by the United States, by recognizing that "the difference [between the family-care and self-care provisions] matters." Brief for the United States in Opposition (No. 01-1368) (May 2002), at 7-8. The Solicitor General had previously informed Congress that, in light of this Court's decision in *Garrett*, the United States no longer had any "sound basis to continue defending the abrogation of Eleventh Amendment immunity . . . in medical-leave cases" under the FMLA. Pet. App. 23. And, in its brief on the merits in *Hibbs*, the United States continued to observe this distinction, confining its arguments in defense of abrogation to the family-

care provision. *See* Brief for the United States (No. 01-1368) (Oct. 2002).

b. Mr. Coleman argues, alternatively, that the self-care provision, standing alone, is "appropriate" Section 5 legislation that supports abrogation. He bases this argument on the assertion that the self-care provision independently addresses the problem of gender discrimination. That assertion is based almost exclusively on his characterization of the provision as a broad prophylactic measure to address discrimination in the granting of pregnancy-related disability leave. This argument suffers from at least three flaws.

First, as discussed above, the legislative record does not demonstrate that *state* employers were discriminating in this regard. Second, the problem identified in the legislative record pertained only to employers who could deny pregnancy-related disability leave to women without violating the Pregnancy Discrimination Act and Title VII if those employers denied medical-leave across the board, to men and women employees alike. The self-care damages remedy sweeps much more broadly than necessary to address the need for self-care leave when there is a family-related need for the leave. Thus, as in *Kimel*, "the indiscriminate scope" of the remedy, together with the "lack of evidence of widespread and unconstitutional . . . discrimination by the States," renders the damages action afforded with respect to the self-care provision an impermissible exercise of Congress's power under

Section 5 of the Fourteenth Amendment. 528 U.S. at 91.

Third, the perceived gap in the Pregnancy Discrimination Act that the self-care leave provision ostensibly was designed to close has in fact been closed, even without a private right of action against state employers under the FMLA. By mandating that all employers, including state employers, provide self-care leave on a gender-neutral basis, there is no longer any employer (within the coverage of the FMLA) that can justify its refusal to grant pregnancy-related disability leave on the basis that it does not provide disability leave at all. Now, when an employee, including an employee of a state, is denied leave in connection with her pregnancy, her employer has treated her differently from similarly-situated employees who obtain leave for other serious health conditions, and her employer has violated Title VII, as amended by the Pregnancy Discrimination Act. Accordingly, she has a private right of action for money damages that is narrowly-tailored to the gender-related problem that Mr. Coleman identifies as having motivated Congress to enact the self-care provision.

For these reasons, the self-care provision of the FMLA does not constitute "appropriate legislation" under Section 5 of the Fourteenth Amendment, and does not validly abrogate the states' sovereign immunity.

II. Abrogation of the States' Sovereign Immunity Is Unnecessary to Advance Congress's Objectives in Requiring Employers to Grant Self-Care Leave.

Although Congress has not validly abrogated state sovereign immunity from claims under the self-care provision, state employers are not exempt from the provision's coverage. As Justice Kennedy has observed, "[w]hat is at issue is only whether the States can be subjected, without consent, to suits brought by private persons seeking to collect moneys from the state treasury." *Hibbs,* 538 U.S. at 759 (Kennedy, J., dissenting). The self-care provision of the FMLA does not provide a basis for abrogating state sovereign immunity and exposing state treasuries to such suits. Congress's attempt to do so crosses the line between enforcing a constitutional right and redefining the scope of constitutionally-guaranteed rights to encompass one that is far removed from the concerns of the Fourteenth Amendment. The absence of a congressionally-authorized right of action for money damages does not mean, however, that state employees will be denied the benefits of this legislatively-created substantive right, for several reasons.

First, as Congress recognized, many states, including Maryland, offer sick-leave benefits that go well beyond what the FMLA requires, and provide protections against the denial of that leave in their civil-service laws. Second, the FMLA was enacted under both Congress's Section 5 power and its Commerce Clause power. Because enactment of the

self-care provision is a valid exercise of Congress's power to regulate interstate commerce, states are bound to comply with the FMLA's self-care provisions, just as they are bound to comply with its family-care provisions. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554-56 (1985). Third, if a state agency wrongfully denies self-care leave under the FMLA, the employee may sue the responsible state official for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). *See, e.g.*, *Nelson*, 535 F.3d 318, 321-22 (5th Cir. 2008) (dismissing damages claims under self-care provision as barred by the Eleventh Amendment but permitting employee to proceed with *Ex parte Young* claim for reinstatement). Moreover, as discussed above, a damages action will lie to redress violations of the FMLA where self-care leave has been denied as the result of sex discrimination or other unconstitutional action. Finally, the United States Department of Labor may bring an action against a state for violating the self-care provision and may obtain both injunctive and monetary relief on an employee's behalf. 29 U.S.C. § 2617(b)(2)-(3), (d); *see Employees of the Dep't of Health & Welfare v. Missouri Pub. Health Dep't*, 411 U.S. 279, 286 (1973).

A suit for damages in each and every instance in which a state employee's request for self-care leave under the FMLA has been denied is not a congruent or proportional remedy for that denial. These other forms of relief, on the other hand, are appropriate and adequate remedies, and there is thus no basis for Congress to disturb "the usual constitutional balance between the States and the Federal Government,"

Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234, 242 (1985), in order to create a workplace entitlement to self-care leave.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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DANIEL COLEMAN,

Petitioner,

v.

MARYLAND COURT OF APPEALS; FRANK BROCCOLINA, STATE COURT ADMINISTRATOR; LARRY JONES, CONTRACT ADMINISTRATOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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INTRODUCTION

The State of Maryland's Brief is written as if the Court never decided *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).[1] It also ignores the intent of Congress as expressed in both the language of the Family and Medical Leave Act (FMLA) and its legislative record.

For nearly a decade, Congress deliberated on how best to achieve gender equality in the granting of workplace leave. Throughout those deliberations, Congress believed that the guarantee of leave for the birth or adoption of a child coupled with the family-care provision was not enough to assure gender equality in leave benefits. Congress knew that those three provisions would not ensure leave for pregnancy-related issues and thus the FMLA needed to contain a self-care provision. Noting the common stereotype that women would be more likely to take leave for the birth or adoption of a child or to care for family members, Congress feared that if it were to create a self-care provision that applied only to women, the FMLA would promote discrimination in the workplace, not remedy it. Employers would perceive the FMLA as providing protection to women only, thereby creating an incentive not to hire women in the first place.

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[1] The Brief for Respondents will be referenced as "Resp. Br. at ___." The Brief for Petitioner will be referenced as "Pet. Br. at ___."

The self-care provision provides leave on a gender-neutral basis, making men just as likely as women to take the leave, and thereby ensuring leave for pregnancy-related medical issues while simultaneously avoiding the negative inferences that would inevitably follow if the statute were to apply to women only.

In enacting the FMLA, Congress drafted a very narrowly targeted statute and wanted to hold states accountable. In order to do so, Congress provided limited monetary damages, abrogating the states' immunity from suits for monetary relief under the Eleventh Amendment.

To validly authorize suits against state employers for damages, Congress must have "unequivocally expressed its intent to abrogate the immunity,"[2] and have acted "pursuant to a valid exercise of power." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Congress must also (1) be acting to defend a constitutional right; (2) examine evidence of actual or potential injury to that right; and (3) develop a remedy congruent and proportional to the injury identified. *City of Boerne v. Flores*, 521 U.S. 507, 530-32 (1997).

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[2] Respondent and its *amici* have conceded that Congress unequivocally expressed its intent to abrogate and, therefore, it is not at issue in this case. Resp. Br. at 3; Brief for Texas et al. as *Amici Curiae* for Respondent at 4 (citing *Hibbs*, 538 U.S. at 726), hereinafter referenced as "Texas et al. at ___."

In *Hibbs*, the Court confirmed that the FMLA is a congruent and proportional response to gender discrimination in the granting of workplace leave. As the State of Maryland correctly notes, the *Hibbs* Court found that the family-care provision was "Congress's 'narrowly targeted' response to a record of states' 'unconstitutional participation in, and fostering of, gender based discrimination in the administration of leave benefits.'" Resp. Br. at 8 (citing *Hibbs*, 538 U.S. at 738, 735). While the precise question in *Hibbs* addressed only the family-care provision, the Court's analysis compels the conclusion that its counterpart – the self-care provision – is likewise a valid abrogation of the States' Eleventh Amendment immunity.

Maryland and its *amici* concede that when Congress is legislating to achieve equal protection for a suspect classification like race or gender, Congress has more power and flexibility to legislate than when addressing discrimination based upon non-suspect classifications like age or disability. Resp. Br. at 18; Brief for Texas et al. as *Amici Curiae* for Respondent at 8-9. Despite the fact that Congress expressly stated that the FMLA was a response to gender discrimination in granting leave, which *Hibbs* confirmed, Maryland relies upon cases that assess Congress' power to abrogate immunity when addressing discrimination based on non-suspect classifications (age or disability) to argue that the FMLA's legislative record does not support abrogation.

The *Hibbs* Court reviewed the same legislative record that is before this Court. Based upon that

record, the *Hibbs* Court found that the family-care provision of the FMLA was Congress' remedy for unconstitutional sex discrimination in the granting of workplace leave. The FMLA, is a comprehensive response to sex discrimination; therefore, each individual provision should be viewed as an integral part of that response.

I. The Statutory Language, The Legislative Record, And *Hibbs* All Confirm That Congress Addressed Unconstitutional Gender Discrimination When It Enacted The FMLA.

Respondent and its *amici* attempt to misdirect the Court by mischaracterizing the self-care provision as "an equal protection right to be free from irrational state employment discrimination based on a medical condition." Resp. Br. at 14 (capitalization omitted); Texas et al. at 10-12. The constitutional right protected by the FMLA is the right to be free from gender discrimination in the workplace. This fact is abundantly clear from the statutory language, the legislative record, and the Court's interpretation in *Hibbs*.

Congress intended the FMLA to provide men and women equal protection of the law in the granting of employment leave. 29 U.S.C. § 2601(b)(4) and (5). Maryland initially recognizes this when it explains that "[Congress intended to act] 'in a manner that . . . , consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential

for employment discrimination on the basis of sex,' §2601(b)(4), and 'promote[s] the goal of equal employment opportunity for women and men.' . . . 29 U.S.C. §2601(b)(5)." Resp. Br. at 1. Despite this recognition, Respondent asserts that the FMLA's "self-care provision was not 'intended to remedy gender discrimination.'" Resp. Br. at 15 (citing *Touvell v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, 422 F.3d 392, 401 (6th Cir. 2005)).[3]

Indeed, the sections of the statute cited by Respondent show that Congress was addressing gender discrimination:

> Congress . . . found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5).
>
> Congress . . . recognized that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees

[3] The Respondent's arguments rest on the lower court opinions, *Touvell* and *Brockman v. Wyoming Dep't of Family Services*, 342 F.3d 1159 (10th Cir. 2003). Resp. Br. at 15-17, 19-22, 25. This reliance, however, is misplaced. These cases, as discussed in the Petition for Certiorari at 14-16 and Pet. Br. at 60-63, undertake only a limited analysis of the FMLA's legislative history. Most importantly, they rely on rationale that was expressly rejected in *Hibbs*.

> and applicants for employment who are of that gender." 29 U.S.C. § 2601(a)(6).

Resp. Br. at 1-2. The very record relied upon by Respondent reflects that Congress sought to provide equal protection of the law based on gender in enacting the self-care provision, specifically with respect to childbirth and pregnancy.

Despite these express congressional findings, Respondent argues that the purpose of the self-care provision was (1) to alleviate "economic burdens of employees" and (2) to prevent "those with serious health conditions from being discriminated against by their employers." Resp. Br. at 15 (citing *Brockman*, 342 F.3d at 1164).

Hibbs rejected this argument, explaining the "FMLA aims to protect the right to be free from gender-based discrimination in the workplace." 538 U.S. at 728. Further, the Court noted "[t]he States' record of unconstitutional discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation." *Hibbs*, 538 U.S. at 735. The Court did not preface these statements by distinguishing among the various provisions of the FMLA. Likewise, Congress declined to make a distinction between family-care and self-care in the "Findings" and "Purposes" sections of the FMLA.

The family-care and self-care provisions are part of a unified approach taken by Congress to combat gender discrimination in the context of workplace

leave. As explained in Petitioner's Brief, just as a table has four legs, the four provisions of the FMLA work to support the statute as a whole. *See* Pet. Br. at 14-16.

II. Congress Had Sufficient Evidence Of Gender Discrimination By The States To Abrogate The States' Eleventh Amendment Immunity.

The FMLA's legislative history confirms that the purpose of the statute is to eliminate gender discrimination in the workplace. Pet. Br. at 36-40. Specifically, the legislative record reveals that the self-care provision of the FMLA was motivated, at least in part, by the following concerns, all of which are responsive to gender discrimination and the potential repercussions of sex-specific corrective action: (1) the need for protected pregnancy-related leave in the weeks and months prior to childbirth;[4] (2) the workplace hardship faced by single mothers required to take self-care leave; and (3) the fear that gender-specific legislation may unintentionally lead to the preemptive non-hiring of female employees.

First, the legislative record makes clear that the self-care provision of the FMLA was intended to remedy gender discrimination in the workplace by singling

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[4] This is covered in detail in the Brief for National Partnership for Women and Families et al. as *Amici Curiae* Supporting Petitioner at 12-22 (hereinafter cited as "National Partnership et al. at ___") and will not be repeated here.

out pregnancy-related illnesses that occur prior to childbirth and expressly recognizing that the FMLA applies to such conditions. By way of example, a relevant House report notes that the term "serious health condition" in the FMLA should be interpreted to include: "ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth" as well as illnesses that might affect men and women equally. H.R. REP. NO. 103-8, pt. 1, at 40 (1993).[5] By emphasizing the inclusion of morning sickness and similar conditions within the coverage of the statute, the FMLA's legislative history shows that the self-care provision was intended to protect pregnancy-related leave not otherwise covered by the other provisions of the FMLA. Moreover, while it is certainly true that the self-care provision of the FMLA was intended to – and does – "address the basic needs of all employees

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[5] The report continued,

> Section 102(a)(2) requires that leave provided under section 102(a)(1)(A) or (B) to care for a newborn child or a child newly placed with the employee for adoption or foster care be taken before the end of the first 12 months following the date of the birth or placement. Circumstances may, however, require that leave begin prior to the actual date of birth or placement. An expectant mother, for example, may take medical leave under section 102(a)(1)(D) prior to the birth of her child if her condition is such that she is unable to work right up to the birth.

H.R. REP. NO. 103-8, pt. 1, at 36 (1993).

. . . young and old, male and female, who suffer from a serious health condition," this same provision of the legislative record also demonstrates that Congress expected the self-care provision to prevent further inequality between the sexes. *See* H.R. REP. NO. 103-8, pt. 1, at 29 (1993) (explaining that "[a] law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. [The FMLA], by addressing the needs of all workers, avoids such a risk.").

Second, Congress heard cautionary tales of abuse by state employers that highlighted the importance of the self-care provision. For example, in a 1991 House hearing, Robert Dawkins, an employee of the state of Georgia, testified,

> [W]e have two types of unpaid leave in Georgia. One of them is regular leave without pay where they will give you your job back. And the other is contingency, and that really boils down to whether your supervisor wants you to come back or not. And often times, they may just say, "Well, we don't want you back."

Hearing on H.R. 2, The Family and Medical Leave Act of 1991: Hearing Before the Subcomm. on Labor-Mgmt. Relations of the H. Comm. on Educ. and Labor, 102d Cong. 33 (1991).[6] The FMLA's legislative

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[6] Petitioner, in its brief, and its *amici* provide other examples as well. *See* Pet. Br. at 24-30; National Partnership et al. at 9-12.

history reveals that the self-care provision was intended to provide job security for working single mothers by ensuring that appropriate self-care medical leave will not result in undue job replacement or other debilitating economic consequences likely to affect working single mothers with particular force. As one House report explains,

> Workers and their families have always suffered when a family member loses a job for medical reasons. . . . But while [the] family has traditionally had a second parent available to help meet such emergencies, single heads of household, *who are predominantly women workers in low-paid jobs*, do not have such backup support. For these women and their children, *the loss of the woman's job when she is sick can have devastating consequences*. . . . Thus, providing job protection for workers who experience a serious medical condition is of increasing significance.

H.R. REP. NO. 102-135, pt. 1, at 20-21 (1991) (emphasis added).[7]

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[7] Furthermore, in drafting the FMLA, Congress on several occasions considered testimony of the American Federation of State, County and Municipal Employees (AFSCME). *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor*, 99th Cong. 82-86 (1986); *Hearing on H.R. 2, The Family and Medical Leave Act of 1991: Hearing Before the Subcomm. on Labor-Mgmt. Relations of the H. Comm. on Educ. and Labor*, 102d Cong. 152-56 (1991).

(Continued on following page)

Last, the statute makes clear that, in enacting the FMLA, Congress found that traditional gender stereotypes, such as those fashioning men as breadwinners and relegating women to the status of homemakers, had become deeply ingrained in the workplace, invariably leading to fewer opportunities for women. *See* 29 U.S.C. § 2601(a)(5); Pet. Br. at 14, 22-23, 25-26. Although Congress undoubtedly sought to rectify this disparity by passing the FMLA, the legislators likewise acknowledged that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. § 2601(a)(6). Congress addressed this problem by drafting the FMLA in gender-neutral terms, thereby "ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis." 29 U.S.C. § 2601(b)(4).

A. The *Hibbs* Court Determined That Congress Established A Sufficient Record Of Sex Discrimination By State Employers Before Enacting The FMLA.

Assessing the FMLA's legislative record in *Hibbs*, the Court noted significant evidence of an extensive

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AFSCME supported the FMLA because the union was having to negotiate piecemeal to get leave for state employees.

history of sex discrimination in the administration of leave benefits by the states. *Hibbs*, 538 U.S. at 722. The Court found that "testimony supported th[e] conclusion, explaining that '[t]he lack of uniform parental and *medical leave* policies in the work place has created an environment where [sex] discrimination is rampant.'" *Id.* at 732 (emphasis added, internal citations omitted).

Although the specific issue in *Hibbs* was the family-care provision of the FMLA, the Court's rationale was not so limited. Rather than focusing on evidence of the states' discrimination in family-care leave, the Court examined state-sponsored gender discrimination in the workplace as a whole. "States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits." *Id.* at 730. The *Hibbs* Court made no meaningful distinction between family-care and self-care leave. The Court and Congress understood that the FMLA's leave provisions were interconnected and could no more be separated from one another than from this country's regrettable history of gender discrimination.

While the legislative record shows considerable evidence of unconstitutional state action, the legislative record need not carry the whole weight of justifying statutory abrogation of the states' immunity from suit. The Court has clarified the type of record Congress must compile when passing legislation that abrogates the States' Eleventh Amendment immunity. This record need not consist only of "evidence of

constitutional violations by the States themselves," and may be established through judicial findings, as well as statistical, legislative, and anecdotal evidence. *Tennessee v. Lane*, 541 U.S. 509, 527 n. 16, 529 (2004). Additionally, the Court is to consider Congress' findings that are "in the text of the [statute] itself." *Id.* at 529. Indeed, the Court has noted that the legislative branch is not held to the same standards of fact-finding as the judicial branch:

> [L]egislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. . . . Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

F.C.C. v. Beach Comms., 508 U.S. 307, 315 (1993). The legislative record of the FMLA clearly meets that standard.

Congress had sufficient evidence of gender discrimination to validly abrogate the States' Eleventh Amendment Immunity when it passed the self-care provision and the FMLA.

B. Respondent Cites Fragments Of The Legislative Record Out Of Context To Diminish Its Significance.

Respondent mischaracterizes the legislative record in an attempt to camouflage evidence that the

self-care provision was meant to address gender discrimination. For example, Respondent quotes a 1989 House report to support its dubious assertion that the self-care provision has two purposes: (1) to alleviate the economic burden of job loss related to illness, and (2) to prevent discrimination against those with serious illnesses. Resp. Br. at 15. Respondent fails to mention that the same paragraph in the report explains that pregnancy and childbirth are covered by the provision. H.R. REP. NO. 101-28, pt. 1, at 23 (1989). These are, of course, gender-specific conditions. The same portion of the report goes on to say that the self-care provision is particularly beneficial for single-parent households because the loss of a job due to illness could be devastating. H.R. REP. NO. 101-28, pt. 1, at 23 (1989). As noted by the Senate report accompanying the FMLA in 1993, most of these single-parent households are led by women. S. REP. NO. 103-3, at 7 (1993).

Respondent also selectively quotes that same 1993 Senate Report to support its assertion that the self-care provision was meant to address only economic concerns. According to Respondent, the self-care provision was enacted to prevent "[j]ob loss because of illness," which "has a particularly devastating effect on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads a household." Resp. Br. at 15. The next paragraph in the report, which was omitted by Respondent, quotes Eleanor Holmes

Norton, who bluntly confronts Congress with how this adversely affects women.

> For the single parent, usually a woman, losing her job when she is unable to work during a time of serious health condition can often mean borrowing beyond prudence, going on welfare, or destitution for herself and her family. . . . The high rates of single parenthood among minority families and of labor force participation by minority single mothers make job-guaranteed leave especially critical[.]

S. REP. NO. 103-3, at 12 (1993). The legislative record that connects economic vulnerability with gender discrimination does not distinguish between family care and self care.

Similarly, Respondent selectively quotes the 1989 House Report to suggest that Congress lacked evidence of states' discriminating with self-care leave.

> Recent studies provided to the [House Education and Labor] Committee indicate that men and women are out on medical leave approximately equally. . . . The evidence also suggests that the incidence of serious medical conditions that would be covered by medical leave under the bill is virtually the same for men and women.

Resp. Br. at 21 (citing H.R. REP. NO. 101-28, pt. 1, at 15 (1989)). But Maryland fails to mention that this portion of the Report is under a section titled "Equal Protection and Non-Discrimination." H.R. REP. NO.

101-28, pt. 1, at 14 (1989). Further, the Report explains how the FMLA responds to gender discrimination:

> A law providing special protection to women or any narrowly defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. Employers might be less inclined to hire women or some other category of worker provided special treatment. For example, legislation addressing the needs of pregnant women only would give employers an economic incentive to discriminate against women in hiring policies; legislation addressing the needs of all workers equally does not have this effect.

H.R. REP. NO. 101-28, pt. 1, at 14 (1989). Additionally, another paragraph omitted by Respondent makes the point that the FMLA attempts to provide gender equality in the granting of leave:

> The bill will provide no incentive to discriminate against women, because it addresses the leave needs of workers who are young and old, male and female, married and single. The legislation is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the Fourteenth Amendment.

H.R. REP. NO. 101-28, pt. 1, at 15 (1989).[8] This language highlights the possible negative inference that

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[8] This is amplified in Pet. Br. at 47-48 and in National Partnership et al. at 9-10, 22-25.

could develop if Congress made the family-care and self-care provisions gender-specific. By making these provisions gender-neutral, Congress sought to provide equal protection, as the section title confirms.

III. The *Hibbs* Court Gave Practical Meaning To "Congruence And Proportionality."

The Court has long recognized that gender discrimination violates the Equal Protection clause of the Fourteenth Amendment. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see also United States v. Virginia*, 518 U.S. 515, 558-59 (1996) (Rehnquist, C.J., concurring) (illustrating the growth of the Court's consensus); Pet. Br. at 25-30. Gender is a quasi-suspect classification subject to intermediate scrutiny. *United States v. Virginia* (applying heightened scrutiny to determine that all-male admissions policy of a military college violated the Equal Protection Clause); *see also Hibbs*, 538 U.S. at 728. The states may treat the sexes differently only if gender classifications "serve important governmental objectives and [are] substantially related to achievement of those objectives." *Boren*, 429 U.S. at 197.

Hibbs clarified how *Boerne*'s congruence and proportionality applies when a suspect classification, like gender discrimination, is at issue. The *Hibbs* Court gave this concept concrete meaning: it recognized that Congress has considerable latitude and power when enacting legislation addressing sex discrimination, and required less of a legislative record to support

Congressional action. However, Maryland's response attempts to strip the Court's congruence and proportionality jurisprudence of its intended meaning.

A. Congress Has Broad Discretion When Legislating To Protect Members Of A Suspect Class.

As discussed in detail in Petitioner's Brief, Congress designed the FMLA to assure equal protection under law in the workplace. *See* Pet. Br. at 11-21. Congress' legislative design is presumptively constitutional because "Congress is a coequal branch of government whose Members take the same oath [as the Supreme Court Justices] do to uphold the Constitution of the United States." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S.Ct. 2504, 2513 (2009) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981)).[9]

The Court's application of congruence and proportionality demonstrates that Congress has more flexibility when legislating to remedy unconstitutional discrimination based upon gender, a quasi-suspect classification, than when enacting statutes to remedy unconstitutional age or disability discrimination. Just two years before the *Hibbs* decision, the same Court analyzed the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62

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[9] *See* Pet. Br. at 30-31.

(2000); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). The Court determined that this country did not have an extensive history of unconstitutional discrimination based on age or disability as it did based on race or sex. *Id.* In *Kimel*, the Court applied a rational-basis review finding that "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." 528 U.S. at 83 (internal quotation omitted).

In *Garrett*, the Court found that "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." 531 U.S. at 368. Thus, a state can justify a practice that discriminates by age or ability merely by showing a rational basis for it. Therefore, Congress must have extensive concrete evidence disproving the rationality of the practice before Congress can enact a remedy that will meet the "congruent and proportional" standard of *Boerne*. *See Kimel*, 528 U.S. at 81-82 (finding that Congress had "very little evidence" that the states were engaging in the prohibited conduct); *see also Garrett*, 531 U.S. at 368.

The Court's discussions in *Kimel*, *Garrett* and *Hibbs* affirm that an extensive legislative record detailing the states' unconstitutional discrimination is unnecessary when a suspect classification is at issue. *Kimel*, 528 U.S. at 89-91; *Garrett*, 531 U.S. at 368-72;

Hibbs, 538 U.S. at 729-35; *see also* Pet. Br. at 32-34. Both *Kimel* and *Garrett* required extensive proof in the legislative records. Pet. Br. at 32-34. In contrast, the "heightened scrutiny review, combined with the well-documented history of state gender discrimination in the employment context, alleviated the need for a microscopic review of the FMLA's legislative history in *Hibbs*." Pet. Br. at 34.

One year after the *Hibbs* decision, the Court revisited the issue of Congress' ability to abrogate the states' immunity in *Lane*, 541 U.S. 509 (2004). In *Lane*, the Court held that the fundamental right of access to the courts as protected by Title II of the ADA justified a valid exercise of Congress' section 5 power. *Id.* at 533-34.

Notably, in *Lane*, Justice Rehnquist, who wrote the *Hibbs* opinion, authored a dissent that was joined by Justices Kennedy and Thomas. This dissent is particularly telling as it repeatedly contrasted what the dissent viewed as the "nonexistent record of constitutional violations" adduced by Congress before enacting the ADA with that amassed for the FMLA, which "we have sustained as valid § 5 enforcement legislation." *Lane*, 541 U.S. at 547-48 (Rehnquist, C.J., dissenting). This dissent took judicial note of the fact that the *Hibbs* decision "trac[ed] the extensive legislative record documenting States' gender discrimination in employment leave policies." *Id.* at 548 (Rehnquist, C.J., dissenting).

In practical terms, as the Court did in *Hibbs*, the *Lane* dissent differentiates between the extensive power Congress has to address unconstitutional discrimination based upon classifications like race and gender, and Congress' reduced power when addressing non-suspect classifications. As recognized in *Hibbs*, because this country has a history of unconstitutional gender discrimination, Congress need not amass copious evidence of widespread gender discrimination by the states before it subjects the state to suits for violations of Equal Protection.[10]

B. The FMLA's Economic Impact Accomplishes The Statute's Fundamental Purpose, To Combat Gender Discrimination In The Granting Of Workplace Leave.

The State of Maryland's argument that the self-care provision responds only to economic injustice also misses the mark. Maryland's argument presupposes that the FMLA as a whole, and the self-care provision in particular, is not a response to gender discrimination. To support this mistaken proposition, the State

[10] Respondent makes much of the fact that the Solicitor General has not taken a position in this case. It is unfortunate that the United States has not offered its views, but the Solicitor General's reasoning for not participating is merely a matter of conjecture that has no relevancy to the issue presented. The previous positions taken by the United States on this issue are discussed in detail in Petitioner's brief. *See* Pet Br. at 22.

relies heavily on *Touvell*, *Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001), and other cases,[11] all of which are impliedly overruled or questioned by *Hibbs*. *See* Pet. Br. at 60-63.

While the *Hibbs* opinion addresses the family-care provision of the FMLA, much of Justice Rehnquist's language refers generally to the rationale behind the FMLA as a whole. "According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States' gender discrimination in this area." *Hibbs*, 538 U.S. at 730. Based on those findings in *Hibbs*, this Court should accept that the self-care provision, as part of the FMLA, is integral to Congress' response to sex discrimination by state employers.

The *Hibbs* Court went on to discuss the deference due to Congress in crafting a remedy once an actual or expected injury is shown. "By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes." *Hibbs*, 538 U.S. at 737. This same rationale should be used to uphold the self-care provision as well.

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[11] Resp. Br. at 25.

As the Court pointed out in *Hibbs*, recognizing that the FMLA is responsive to gender discrimination gives Congress leeway to craft the appropriate remedy. In Maryland's view, in the face of evidence of gender-based discrimination by the States, Congress could do no more in exercising its section 5 power than simply proscribe such discrimination. Resp. Br. at 15. However, the *Hibbs* Court explained that this "position cannot be squared with our recognition that Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Hibbs*, 538 U.S. at 737 (quoting *Kimel*, 528 U.S. at 81).

C. Congress Tailored The FMLA Both To Prevent And To Remedy Violations Of A Constitutional Right That Other Statutes Fail To Correct.

The Court recognized that the FMLA was enacted because both Title VII and the Pregnancy Discrimination Act had failed to achieve the purpose of ending gender discrimination at the "faultline between work and family – precisely where sex-based overgeneralization has been and remains strongest." *Hibbs*, 538 U.S. at 737. The Court even addressed the shortcomings of these statutes. "[I]n light of the evidence before Congress, a statute mirroring Title VII, that simply mandated gender equality in the administration of leave benefits, would not have achieved

Congress' remedial object. Such a law would allow States to provide for no family leave at all." *Id.* at 738. To address this, Congress provided twelve weeks of unpaid leave.

The *Hibbs* Court used clear language to describe the right being protected and the appropriateness of the remedy. The leave is not a blanket entitlement, but in fact imposes a number of requirements on the employee. There can be little doubt that twelve weeks of unpaid leave is congruent and proportional. The Court confirmed: "We also find significant the many other limitations that Congress placed on the scope of this measure." *Hibbs*, 538 U.S. at 738. The Court then lists those limitations which are discussed in the Petitioner's brief. Pet. Br. at 56-57.

The *Hibbs* Court concluded that the family-care provision of the FMLA "is congruent and proportional to its remedial object, and can 'be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Id.* at 740 (quoting *Boerne*, 521 U.S. at 532). As self-care addresses the same Constitutional violation as family care, there is no reason for this Court to depart from that finding.

IV. The Provision Of Monetary Damages Is A Critical Component Of The Congruent And Proportional Remedial Scheme Crafted By Congress.

Monetary relief provides a disincentive for unlawful conduct that injunctive relief alone does not

provide. Reinstatement without back pay or other monetary damages is one possible injunctive remedy authorized by *Ex parte Young*, 209 U.S. 123 (1908) as interpreted by *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (explaining that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury"). But assuming reinstatement is available, it is not an adequate, congruent, or proportional remedy for the harm that a wrongfully terminated employee sustains. Were he to get his job back tomorrow, Mr. Coleman would still be out several years' salary, benefits, and the expenses of this litigation. That is why Congress found it necessary to hold the states liable to their employees for monetary damages. 29 U.S.C. § 2617(a). Shorn of its monetary damages provision, the FMLA would provide an employee some relief, as Respondent points out. Resp. Br. at 31. But that relief would be prospective injunctive relief under *Edelman*, that is, reinstatement without back pay. *Edelman*, 415 U.S. at 677. Practically speaking,

> denial of monetary relief means that a plaintiff who prevails on the merits of his claim that a State has [violated a right] will often be denied redress for the injury he has suffered, because in many instances "prospective relief accords . . . no remedy at all." . . . Injunctive relief from a federal court may address a violation going forward, but this fact will be of cold comfort to the victims of

> serious, non-recurring violations for which equitable relief may be inappropriate.

Sossamon v. Texas, 131 S.Ct. 1651, 1669 (2011) (Sotomayor, J. dissenting) (quoting *Franklin v. Gwinnett Co. Pub. Schs.*, 503 U.S. 60, 76 (1992)). Reinstatement is "cold comfort," and an impoverished worker might well give up before prevailing on a valid claim.

Respondent's *Ex parte Young* argument strips the FMLA of its deterrent power, contrary to Congress' intent. Congress believed that providing lost wages was an important component of the FMLA. *See* Pet. Br. at 18-21. Congress made the states, like other employers, liable for monetary damages if they refuse to let employees come back to work after less than 12 weeks of self-care or family-care leave. Without the sting of monetary damages, the FMLA carries almost no incentive to compel compliance by the states, as envisioned by Congress. Without monetary relief there is no salient cause of action.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the United States District Court for the District of Maryland as well as the Court of Appeals for the Fourth Circuit and remand for further proceedings.

Respectfully submitted on this 28th day of December, 2011.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

DANIEL COLEMAN,
Petitioner,

v.

MARYLAND COURT OF APPEALS;
FRANK BROCCOLINA, STATE COURT ADMINISTRATOR;
LARRY JONES, CONTRACT ADMINISTRATOR,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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INTEREST OF *AMICUS CURIAE*

The Constitutional Accountability Center ("CAC") is a think tank, public interest law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms and structural safeguards that it guarantees. CAC accordingly has a strong interest in the Court's interpretation of the Eleventh Amendment and of Congress's enforcement powers under the Fourteenth Amendment.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case poses a fundamental question about the permissible role of Congress in passing laws to enforce constitutional rights. It also poses a fundamental question about the permissible role of this Court in responding to congressional action to enforce constitutional rights.

Congress passed a law that authorizes Daniel Coleman to enforce a legal right in federal court. Ac-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission. Petitioner and Respondent have granted blanket consent to the filing of *amicus* briefs.

cording to the State of Maryland, the Constitution nevertheless shuts the federal courthouse door to Mr. Coleman for two related reasons. First, the Eleventh Amendment generally bars federal actions against a State by its citizens. Second, Congress purportedly lacks power in the context of this particular law to override the Eleventh Amendment.

Maryland's position is doubly flawed. The first proposition is not faithful to the language and purpose of the Eleventh Amendment. The second proposition is not faithful to the language and purpose of Section 5 of the Fourteenth Amendment.

The Eleventh Amendment does not, by its terms, apply to a suit by a citizen against his or her own State. Accordingly, this Court should no longer apply an expansive, extra-textual penumbra to deprive federal courts of jurisdiction over suits by a citizen against his or her own State. An interpretation of the Eleventh Amendment that accords with its language and historical purpose is sufficient to reject the removal of federal court jurisdiction advocated by Maryland.

Even if this Court continues to apply the Eleventh Amendment to a suit by a citizen against his or her own State (notwithstanding the Amendment's explicit language), the language and purpose of Section 5 of the Fourteenth Amendment readily establish that Congress possessed ample authority to enact the self-care provision of the Family Medical Leave Act (the "FMLA" or the "Act") and to apply it to state employers.

ARGUMENT

I. The Eleventh Amendment Does Not Bar Mr. Coleman's Claim.

It is important and appropriate for this Court to revisit its Eleventh Amendment framework.

The Framers of the Eleventh Amendment crafted precise constitutional language in response to a specific historical event. That event was this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which adjudicated a federal lawsuit by a citizen of one State against a State that was not his own. Subsequently, Congress passed, and the States ratified, an Amendment with language that targets that exact circumstance: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by *Citizens of another State* . . . ." U.S. Const. amend. XI (emphasis added).

Nearly a century later, in *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court overrode the Amendment's plain language and began applying a "second" Eleventh Amendment to effectuate a far broader concept of state sovereign immunity that bars most claims for damages brought by a citizen against his or her own State in federal court. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (Stevens, J., concurring) ("It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment . . . . In addition, there is the defense of sovereign immunity that the

Court has added to the text of the Amendment . . . ."); *cf. Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand . . . for the presupposition . . . that the States entered the federal system with their sovereignty intact . . . .").[2]

This judicial approach erroneously rejects the plain language of an unambiguous provision. It also is based on a mistaken view of the purpose and history of the Eleventh Amendment and its relationship to the sovereign immunity doctrine.[3]

A correct understanding of the Amendment's history, purpose and plain language demonstrates that

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[2] *See also, e.g.*, John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663, 1683 (2004) ("[T]he *Hans* Court relied on the political context and the temper of the times to infer a broader spirit than the Amendment's text could bear . . . .").

[3] *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 763-64 (1999) (Souter, J., dissenting) ("There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being inalterable."); *Seminole Tribe of Fla. v. Florida*, 544 U.S. 44, 130 (1996) (Souter, J., dissenting) (similar); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258-59 (1985) (Brennan, J., dissenting) (similar); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1035-37 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1890-91 (1983).

the Eleventh Amendment does not bar a federal suit by an individual against his or her own State.

A. The Eleventh Amendment's Purpose Highlights Its Limited Scope.

The circumstances of *Chisholm* led directly to the language of the Amendment and inform its original purpose. The historical context reveals that the Amendment's Framers specifically designed it to limit Article III's Citizen-State diversity jurisdiction by proscribing litigation by citizens of one State against another State when the only basis for federal jurisdiction is diversity of citizenship.

1. *Chisholm* Led to the Scope and Contours of the Eleventh Amendment.

Chisholm arose from a 1777 transaction in which Robert Farquhar, a South Carolina merchant, sold goods to commissioners of the State of Georgia for soldiers quartered in Savannah. *Chisholm v. Georgia*, Case File, Records of the Supreme Court of the United States, Record Group 267 (National Archives) *cited in* Doyle Mathis, *Chisholm v. Georgia: Background and Settlement*, 54 J. Am. Hist. 19, 20 (1967). Although the Georgia House of Representatives authorized payment for these goods, the State's commissioners never paid. *Journal of the House of Representatives of the State of Georgia* 365 (1789) *cited in* Mathis, *supra*, at 21; 5 Documentary History of the Supreme Court of the United States 1789-1800: Suits Against the States 127 (Maeva Marcus ed. 1994) [hereinafter, "__ DHSC"]. After Farquhar's death, Alexander Chisholm, and other executors of Farqu-

har's estate, requested payment from the legislature, but it refused. *Journal of the House of Representatives of the State of Georgia* 359, 364-66 (1789) *cited in* Mathis, *supra*, at 22 n.15; *Journal of the Senate of the State of Georgia* 111, 227 (1789) *cited in* Mathis, *supra*, at 22 n.15.

Chisholm then brought a common law claim against Georgia in federal court, seeking 100,000 pounds sterling in damages. *See* 5 DHSC, *supra*, at 127-29. Georgia raised a sovereign immunity defense. Def.'s Plea to Jurisdiction, *Farquhar v. Georgia*, No. RG 21 (C.C.D. Ga. filed Oct. 17, 1791) (arguing that Georgia, as a "free, sovreign [sic] and independent state . . . cannot be drawn or compelled . . . to answer, against the will of the said State") *reprinted in* 5 DHSC, *supra*, at 143. Justice Iredell – who heard the circuit court case along with district Judge Nathaniel Pendleton – concluded that Georgia was not subject to suit in the lower federal courts because the Supreme Court holds original jurisdiction over cases in which a State is party. 5 DHSC, *supra*, at 131, 153-54; Mathis, *supra*, at 23. Accordingly, the circuit court dismissed the case for want of jurisdiction.

Subsequently, this Court heard the case pursuant to its original jurisdiction. Georgia never appeared in the proceedings, refusing to recognize the Court's authority. *Chisholm*, 2 U.S. (2 Dall.) at 429. In seriatim opinions, the Court found for Chisholm four-to-one, holding that Article III and the Judiciary Act of 1789 gave federal courts authority to grant the plaintiff relief against Georgia. *Id.* at 450-53 (Blair, J.), 453-66 (Wilson, J.), 467-69 (Cushing, J.), 469-79 (Jay, C.J.).

The Court held only that federal courts were authorized to hear common law claims when the plaintiff is diverse from the State being sued – *i.e.*, when a citizen of one State sues a different State in federal court. Four opinions relied upon Article III's plain language and the notion that the States, were subordinate to the national "people" – the only sovereign the Constitution contemplates. Thus, the plea of sovereign immunity to a common law cause of action, in the suit by a citizen of one State against another State, was ineffectual.

The Court did not address federal question jurisdiction. *See Atascadero*, 473 U.S. at 282-83 (Brennan, J., dissenting). Notably, Justice Iredell, the lone dissenter, distinguished between common law claims, such as Chisholm's, and claims raising federal questions. *Chisholm*, 2 U.S. (2 Dall.) at 449 (opining that he need not determine whether Georgia is subject to suit based on federal law). Moreover, Justice Iredell noted that the Court neither addressed nor needed to address whether Congress had authority to pass a "new law" that would subject the States to federal court jurisdiction. *Id.*; *see also Atascadero*, 473 U.S. at 283 (Brennan, J., dissenting) ("[E]ven Justice Iredell's dissent did not go so far as to argue that a State could *never* be sued in federal court.").

The Eleventh Amendment was a reaction to *Chisholm*'s holding regarding diversity jurisdiction. This precipitating event did not involve federal question jurisdiction, or a suit by a citizen against his own State.

2. The Development of the Amendment's Text Further Demonstrates Its Limited Scope.

Within two days of this Court's decision, members of Congress proposed two different amendments to overturn the decision. The proposal that ultimately prevailed reveals that the Amendment was limited to the specific concern in *Chisholm* – Article III's Citizen-State diversity clause.

The first proposal, which Massachusetts Representative Theodore Sedgwick introduced on February 19, 1793, contained very broad language:

> [N]o state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.

Proceedings of the United States House of Representatives, Gazette of the U.S. (Phila. Feb. 19, 1793) *reprinted in* 5 DHSC, *supra*, at 605-06. This proposed amendment would have removed from federal jurisdiction *any* suit brought by *any* citizen against *any* State.[4]

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[4] Several States proposed similar restrictions on Article III as a condition of ratification. *See* 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 660-61 (Jonathan Elliot 2d rev. ed. 1891) (Virginia proposal) [hereinafter, "__ Elliot"]; 4

The following day, a narrower alternative was introduced in the Senate.

> The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

3 Annals of Cong. 651-52 (Feb. 20, 1793). This proposal – reflecting the language of Article III's Citizen-State diversity clause – removed federal jurisdiction only from suits brought by an individual who was not a citizen of the state defendant.

Congress tabled both proposals.

In January 1794, Congress revisited the issue and rejected Representative Sedgwick's broad proposal. Both houses of Congress introduced identical resolutions that closely resembled the narrow proposal initially offered in the Senate. These resolutions, which eventually became the Eleventh Amendment, merely added the words "be construed to" to the prior Senate resolution.

> The Judicial power of the United States shall not *be construed to* extend to any suit in law

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Elliot, *supra*, at 246 (North Carolina proposal); 2 Documentary History of the Constitution of the United States of America 1786-1870, at 317 (U.S. Dep't of State 1894) (Rhode Island proposal); 1 St. George Tucker, Blackstone's Commentaries: with Notes of Reference, to the Const. and Laws, of the Fed. Gov't of the United States; and of the Commonwealth of Virginia 352 & n.* (1803) (Massachusetts and New Hampshire proposals). None of these proposals was adopted.

> or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.

4 Annals of Cong. 25 (Jan. 2, 1794) (proposal) (emphasis added); *id.* at 30-31 (Jan. 14, 1794) (passing the Senate 23-to-2); *id.* at 477-78 (Mar. 4, 1794) (passing the House 81-to-9).

The required twelve States ratified the Amendment quickly – in less than a year. However, Congress did not receive notice of ratification from all of these States until January 8, 1798. *See* Letter from Pres. John Adams to U.S. Congress (Jan. 8, 1798) *reprinted in* 5 DHSC, *supra*, at 637.

By rejecting the broad language proffered by Representative Sedgwick and accepting the narrow alternative, the Framers of the Eleventh Amendment did not constitutionalize broad sovereign immunity in the language of the Amendment, and, in fact, explicitly declined to do so. Instead, in the language they chose, they adopted a specific limitation of Article III to exclude federal suits by citizens of one State against another State.

B. The Court Has Relied on an Erroneous Interpretation of the Framers' Understanding of Sovereign Immunity.

In its Eleventh Amendment jurisprudence, the Court has invoked the Framers' views of the Constitution as a reason for giving the Amendment a broader sweep than its language commands. For example, in *Pennhurst v. State School & Hospital v. Halderman*, the Court parsed the constitutional debates and concluded that the "Amendment's

language overruled the particular result in *Chisholm*, but . . . its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." 465 U.S. 89, 98 (1984); *see also Blatchford*, 501 U.S. at 779.

This conclusion misapprehends the Framers' views on sovereign immunity. The Court's jurisprudence has been interpreted as suggesting that "everyone involved in framing or ratification of the Constitution" had an expansive view of state immunity, *Atascadero*, 473 U.S. at 259 (Brennan, J., dissenting).

The Court's view is inaccurate. As Justice Souter explained in his *Alden* dissent, "[t]he American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone." 527 U.S. at 764-65. Importantly, the Crown's immunity from the courts was a *personal* privilege that did not extend to other government actors. *See, e.g.*, Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown 5 (1820); Edwin M. Borchard, *Government Liability in Tort*, 34 Yale L. J. 1, 4 (1924); Gibbons, *supra*, at 1895-96.

Moreover, subjects of the Crown were not without recourse for wrongs committed by the Crown. They could pursue remedies via the "petition of right" or the *monstrans de droit*. *See, e.g.*, *Monckton v. Att'y Gen.*, 2 Mac. & G. 402, 412 (Ch. 1850) (Lord Cottenham) *cited in* Borchard, *supra*, at 5 n.10; *see also Alden*, 527 U.S. at 769-70 (Souter, J., dissenting); Gibbons, *supra*, at 1895-96. Thus, "sovereign immunity" in the English tradition was far from absolute.

Furthermore, a review of colonial charters and constitutions supports the conclusion that the ratifiers held a narrower view of sovereign immunity than the Court has suggested. For example, the charters of New England, Massachusetts Bay, Connecticut, Georgia, and Rhode Island and Providence Plantations expressly provided that the governing authorities could be sued. *See* Charter of New England – 1620 *reprinted in* 5 Sources & Documents of United States Constitutions 16, 19 (William F. Swindler ed. 1973) [hereinafter, "__ Swindler"]; Charter of Massachusetts Bay – 1629 *reprinted in id.* at 32, 36; Charter of 1662 (Connecticut) *reprinted in* 2 Swindler, *supra*, at 131; Charter of Rhode Island & Providence Plantations – 1663 *reprinted in* 8 Swindler at 362, 363; Charter of 1732 (Georgia) *reprinted in* 2 Swindler at 433, 434. Connecticut and Rhode Island each adopted its existing charter as the State constitution, adding only bills of rights that reinforced that the government was subject to suit. *See* Constitutional Ordinance of 1776 *reprinted in* 2 Swindler, *supra*, at 143; 8 Swindler at 351. Similarly, the Delaware and Massachusetts constitutions made clear that their citizens had judicial remedies for *all* wrongs committed against them, without immunizing the State. *See* A Declaration of Rights & Fundamental Rules of the Delaware State *reprinted in* 2 Swindler at 197, 198; Constitution of Massachusetts – 1780 *reprinted in* 5 Swindler at 92, 94.

The ratification debates further undermine the suggestion of a sweeping view of sovereign immunity at the time the Eleventh Amendment was ratified. The debates discussing Article III are especially salient and indicate that the Framers did not have a monolithically expansive view of sovereign immunity

– or uniformly believe that the concept should be constitutionalized.

For instance, during the Pennsylvania convention, James Wilson – a supporter of the Constitution and future Supreme Court justice – touted federal jurisdiction over the States (for the purpose of enforcing the treaty with Britain) as a justification for ratification. 2 Elliot, *supra*, at 490.[5] Moreover, in the North Carolina convention, Federalist William Davie praised Article III as a means to provide a neutral forum when a State was party to litigation. 4 Elliot, *supra*, at 159. In addition, Alexander Hamilton – who was "among the leading participants in the debate surrounding ratification" who favored the Constitution and whose comments provide "[t]he only arguable support for the Court's absolutist view" on sovereign immunity, *Alden*, 527 U.S. at 773 (Souter, J., dissenting) – acknowledged the possibility that the States could surrender immunity "in the plan of the convention." Federalist No. 81, at 446 (Hamilton) (E.H. Scott ed., 1898). In fact, he noted that States *would* be subject to federal jurisdiction in cases that "involve the *peace* of the *Confederacy*," including suits by foreigners based on the treaty with Britain. Federalist No. 80, at 434 (Hamilton) (E.H. Scott ed., 1898).

Relatedly, opponents of the Constitution did not believe that it codified broad sovereign immunity.

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[5] Notably, Justice Wilson (who ruled in Chisholm's favor) and Edmund Randolph (who argued on Chisholm's behalf) served on the Committee of Detail, which drafted Article III. 2 The Records of the Federal Convention of 1787, at 106 (Max Farrand ed. 1937).

For example, William Grayson observed that "the consent of foreign nations must be had before they become parties; *but it is not so with our states*. It is fixed in the Constitution that they *shall* become parties." 3 Elliot, *supra*, at 567 (emphasis added); *see also* Gibbons, *supra*, at 1907. Patrick Henry, another anti-Federalist, rejected Madison's argument that Article III ensured only that a State could participate as a plaintiff in federal court. *See* 3 Elliot, *supra*, at 533 ("The only operation [Article III] can have is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court."). To Henry, Madison's argument was not supported by the text of Article III and, therefore, was "perfectly incomprehensible." *Id.* at 543. According to Henry, "[t]here is nothing to warrant [Madison's] assertion . . . . What says the paper? That it shall have cognizance of controversies between a state and citizens of another state without discriminating between plaintiff and defendant." *Id.*

Against this backdrop, "[s]ome Framers" concluded that "sovereign immunity was an obsolete royal prerogative inapplicable in a republic." *Alden*, 527 U.S. at 764 (Souter, J., dissenting); *see also Seminole Tribe*, 517 U.S. at 95-98 (Stevens, J., dissenting).

A central component of the justification for expanding the Eleventh Amendment beyond its text – that there was a uniform intent to constitutionalize sovereign immunity, which the Eleventh Amendment restored – does not square with history. A reliance on history, therefore, is an unsound justification for overriding the explicit language of the Eleventh Amendment.

C. The Court Should Apply the Plain Language of the Amendment.

The Eleventh Amendment does not bar Daniel Coleman's congressionally authorized suit from being heard in federal court. The Amendment's text is specific and unambiguous. It bars only a suit against "one of the United States by [a] Citizen[] of *another State*." U.S. Const. amend. XI (emphasis added). Mr. Coleman is a citizen of Maryland seeking to bring a suit asserting a federal right against an entity and officials of his home State.

A contrary conclusion can be reached only by disregarding the Amendment's plain language. *See, e.g.*, *Blatchford*, 501 U.S. at 779 ("Despite the narrowness of its terms, . . . we have understood the Eleventh Amendment to stand *not so much for what it says* . . . .") (emphasis added).

Courts should not easily disregard the precise language of the Amendment. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202-03 (1819) ("But if, in any case, the plain meaning of a [constitutional] provision . . . is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."). The language the Amendment's Framers chose "was not due to chance or ineptitude." *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting).

The precise language of the Eleventh Amendment reflects a carefully crafted provision revealing that

its Framers decided "to go so far and no farther" in addressing the issue being targeted – the Citizen-State diversity clause as interpreted in *Chisholm*. Manning, *supra*, at 1750. Accordingly, the Court should honor the language that the Framers employed, the language that Congress approved, and the language that the States ratified.

As a threshold matter, then, the Eleventh Amendment does not provide a sound basis for dismissing Mr. Coleman's case. For this Court to hold otherwise is to continue rewriting the Eleventh Amendment, unjustifiably shutting the federal courthouse door to litigants seeking redress and vindication of their federal rights.

II. Congress Permissibly Used Its Broad Power Pursuant to Section 5 of the Fourteenth Amendment to Enact the Self-Care Provision of the FMLA.

Even if the Court does not at this time re-visit its interpretation of the Eleventh Amendment, the Court nonetheless should permit Mr. Coleman's claim to proceed. In adopting the self-care provision of the FMLA, Congress permissibly exercised its powers under the Fourteenth Amendment and abrogated Eleventh Amendment immunity.

Section 5 of the Fourteenth Amendment, by its terms, is broad and majestically unadorned: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. The Amendment, as passed by Congress and ratified by the States, vests Congress with explicit constitutional authority to ensure that the post-Civil War constitutional guarantees, includ-

ing Equal Protection and Due Process, are enforced. Accordingly, state sovereign immunity is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003) (citation omitted).

A proper understanding of the language and purpose of Section 5 establishes that the self-care provision is a permissible exercise of Congress's power. In describing the boundaries of congressional power under Section 5 in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), the Court stated that there must be "congruence and proportionality" between the injury to be prevented or remedied and the measures adopted to achieve that end. An application of *Boerne* to this case establishes that the self-care provision falls well within Congress's broad enforcement authority under Section 5.

Even though, in this case, the relevant enforcement legislation passes the *Boerne* test, scholarship since *Boerne* has concluded that the congruence and proportionality test constricts the scope of Section 5 beyond its appropriate compass. As a result, a test that is more reflective of the constitutional language and purpose should be considered.

Whether through an application of *Boerne* or a rethinking of its premise, the principle of broad congressional enforcement power – firmly rooted in the text and history of Section 5 of the Fourteenth Amendment – should be reiterated and applied in this case.

A. Congress Has Broad Enforcement Power Pursuant to Section 5 of the Fourteenth Amendment.

The text and history of Section 5 make clear that, by design, Congress has substantial powers to enact legislation to enforce the Fourteenth Amendment. An analysis of the leading voices from the pre-Civil War period to Reconstruction – the individuals who debated, drafted, proposed and ratified the Amendment – leads to the conclusion that Congress has broad authority under Section 5 to use its judgment to enforce Fourteenth Amendment guarantees.

1. The Plain Language of the Fourteenth Amendment Gives Congress Broad Discretion to Choose the Means by Which It Legislates.

The text of the Fourteenth Amendment establishes Congress's broad discretion to enact legislation pursuant to Section 5. The Framers of the Amendment deliberately chose language calculated to give Congress wide latitude in selecting the legislative measures it deemed necessary. The plain language vests Congress with the "power to enforce" the substantive protections "by appropriate legislation." U.S. Const. amend. XIV, § 5.

The use of the phrase "by appropriate legislation" was no accident; it carried a specific meaning in 1866. This meaning gave effect to the expressed wishes of the Amendment's supporters to assign Congress a powerful role in protecting against unconstitutional actions by States. In particular, the phrasing echoed Chief Justice Marshall's classic statement in

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), that established the fundamental principle for determining the scope of Congress's powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional." *Id.* at 421 (emphasis added); *see also Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 614-15 (1870) (quoting this passage in full and declaring that "[i]t must be taken then as finally settled . . . that the words" of the Necessary and Proper Clause are "equivalent" to the word "appropriate"); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1810-15 (2010); Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 822-27 (1999); Steven A. Engel, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 Yale L.J. 115, 131-34 (1999); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 178 n.153 (1997).

By linking Section 5 to the Supreme Court's classic elucidation of congressional power under Article I – well known at the time of the ratification of the Amendment – it was understood that Congress would have wide discretion to choose whatever legislative measures it deemed "appropriate" for achieving the purposes of the Amendment. *See McCulloch*, 17 U.S. at 421 (indicating that "the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution").

The Framers of the Amendment chose this broad, sweeping language conferring on Congress the power to enforce the Constitution's new guarantees of liberty and equality because they were reluctant to leave the judiciary with the sole responsibility for protecting constitutional rights. In the aftermath of the decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), the Framers were determined to give Congress a primary role in securing the guarantees of the Fourteenth Amendment. *See* McConnell, *supra*, at 182 (explaining that the Enforcement Clause was "born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power"); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 765 (1998) (observing that the Framers "did not entrust the fruits of the Civil War to the unchecked discretion of the Court that decided *Dred Scott*").

The Framers thus expected courts to review acts of Congress pursuant to Section 5 with the deferential posture taken by Chief Justice Marshall in *McCulloch*. *See* 17 U.S. at 423 (refusing "to pass the line which circumscribes the judicial department, and to tread on legislative ground"). Pursuant to this review, a court would strike down an act of Congress only when Congress "adopt[ed] measures which are prohibited by the constitution." *Id.*[6]

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[6] Under this deferential standard, this Court in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), upheld the Fugitive Slave Act – a comprehensive federal legislative scheme. In doing so, the Court cited *McCulloch* and specifically noted Congress's broad power: "The end being required . . . the means to accomplish it are given also; . . .

By borrowing language from *McCulloch* in drafting the text of the Fourteenth Amendment enforcement clause, the Framers thus adopted a broad understanding of congressional power. From their perspective, Congress would be the primary judge of the necessity of any measure that was directed at a legitimate end. *See* Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (Rep. Wilson).

2. The Ratification Process Confirms That the Framers Sought to Confer Broad Legislative Discretion on Congress.

In light of the broad sweep of Section 5, the debates over the Fourteenth Amendment proved to be an extension of a larger debate over federalism and congressional power. And the outcome was decisive. In ratifying the Amendment, the nation confirmed that Congress should have significant autonomy and discretion in choosing what measures were appropriate under Section 5 to secure the rights and liberties promised by the Amendment.

From the early stages, the leading proponents of the Amendment – Senator Jacob Howard and Representative John Bingham – were clear regarding the Amendment's purpose: shifting the balance of power between the States and the federal government by giving Congress wide latitude to enact "appropriate" measures. Introducing the proposed Amendment to the Senate in May 1866, Senator Howard empha-

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the power flows as a necessary means to accomplish the end." *Id.* at 619.

sized that the antebellum Constitution had not granted Congress adequate authority to protect constitutional rights against state infringement. *See* Cong. Globe, 39th Cong., 1st Sess. 2764-66 (1866). According to Howard, the proposed enforcement clause in Section 5 would remedy this deficiency by providing a "direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." *Id.* at 2766.

Senator Howard rejected any narrow reading of Congress's enforcement power. Section 5, Howard declared, conferred authority to pass any "laws which are appropriate to the attainment of the great object of the amendment." *Id.* Further, it cast "upon Congress the responsibility of seeing to it, for the future, that . . . no State infringes the rights of persons or property." *Id.* at 2768.

Members of the House echoed these sentiments, confirming the breadth and significance of congressional enforcement power. Representative Bingham emphasized that Section 5 would bring a fundamental and necessary change in the balance of power between the federal and state governments. *Id.* at 2542 (noting that Section 5 would correct the constitutional defect that had led to "many instances of State injustice and oppression"). Other supporters concurred, praising Congress's broad enforcement power and the protection it would afford citizens from state encroachments. *See id.* at 2498 (Rep. Broomall) ("We propose . . . to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction. Who will deny the necessity of this? No one."); *id.* at 2510-11

(Rep. Miller) ("And as to the States it is necessary . . . ."). These supporters understood, moreover, that the Amendment would grant Congress the authority to decide what is "appropriate" for an enforcement mechanism. *See* Cong. Globe, 39th Cong., 1st Sess. 43 (1865) (Sen. Trumbull) ("What that 'appropriate legislation' is, is for Congress to determine, and nobody else."); Cong. Globe, 39th Cong., 1st Sess. 1124 (1866) (Rep. Cook) ("Congress should be the judge of what is necessary . . . .").

The Fourteenth Amendment's opponents did not disagree with this understanding. To the contrary, they also understood Section 5 to confer broad discretion on Congress to enforce the Amendment's provisions. In fact, this broad power was one of the reasons for their opposition to the Amendment. *See* Cong. Globe, 39th Cong., 1st Sess. 2500 (1866) (Rep. Shanklin); *id.* at 2538 (Rep. Rogers); *id.* at 2940 (Sen. Hendricks). In State after State in the South, opponents of the Fourteenth Amendment feared that the authority to pass "appropriate legislation" would give Congress excessive power to define the obligations of States with respect to their citizens. As one Texas State Senator put it, "[w]hat is 'appropriate legislation?' The Constitution is silent; therefore, it is left for the Congress to determine." *Journal of the Senate of the State of Texas*, 11th Legis., 421-22 (1866). In a similar vein, Governor Jenkins of Georgia lamented that Congress would have too much power over the States, and that it would "be contended that [members of Congress] are the proper judges of what constitutes appropriate legislation. If therefore, the amendment be adopted, and . . . Congress . . . be empowered 'to enforce it by appropriate legislation,' what vestige of hope remains to the people of those

States?" James E. Bond, No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment 238 (1997). While supporters and opponents parted ways on the merit of the Amendment, both sides agreed that it would provide Congress broad enforcement authority.

3. The Understanding of Section 5 During Reconstruction Underscores Congress's Broad Discretion to Adopt Enforcement Measures It Deems Appropriate.

Post-ratification interpretations of Section 5 confirm that the provision was understood to give Congress wide latitude in selecting the legislative measures it deemed appropriate.

First, subsequent Congresses understood the power conferred by Section 5 to be broad. Senator Sumner, for instance, reasoned that "the Supreme Court will not undertake to sit in judgment on the means employed by Congress in carrying out a power which exists in the Constitution." Cong. Globe, 42nd Cong., 2nd Sess. 728 (1872). Likewise, Representative Lawrence stated that Congress would be the "exclusive judge of the proper means to employ" its power under Section 5. Cong. Rec., 43rd Cong., 1st Sess. 414 (1874). In fact, it was widely accepted that Congress would retain great discretion in deciding what is "appropriate" in enforcement legislation. *See, e.g.*, Cong. Globe, 41st Cong., 2nd Sess. 3882 (1870) (Rep. Davis) ("No broader language could be adopted than this with which to clothe Congress with power . . . . Congress, then, is clothed with so much

power as is necessary and proper to enforce the [Fourteenth Amendment], and is to judge from the exigencies of the case what is necessary and what is proper."); Cong. Globe, 41st Cong., 2nd Sess. App. 548 (1870) (Rep. Prosser) ("The amendments to the Constitution were not adopted for theoretical, but for practical purposes.").

Second, this Court, in its foundational construction of Section 5 in *Ex parte Virginia*, 100 U.S. 339 (1879), concurred with this expansive view of Congress's powers. Employing language that tracked *McCulloch*, this Court stated: "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain . . . if not prohibited, is brought within the domain of congressional power." *Id.* at 345-46; *see also Strauder v. West Virginia*, 100 U.S. 303, 311 (1879) ("The form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide.").

Congressional and judicial interpretations of Section 5 shortly after ratification confirm that the clause afforded nearly unfettered discretion to enact enforcement legislation, so long as that legislation did not run afoul of any specific constitutional prohibition.

B. Application of the *Boerne* Test Confirms the Permissibility of the Self-Care Provision of the FMLA.

Under an appropriate interpretation of *Boerne*, Mr. Coleman's claim should be permitted to proceed. The language, history and purpose of Section 5 pro-

vide the correct framework for the proper application of that test.

The purpose of Section 5 was to grant Congress broad enforcement powers and "discretion, with respect to the *means* by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." *McCulloch*, 17 U.S. at 421 (emphasis added). In other words, Congress would have authority to pass any laws appropriate to the "attainment of the great *object* of the amendment." Cong. Globe, 39th Cong., 1st Sess. 2766 (emphasis added); *see also Ex parte Virginia*, 100 U.S. at 345-46 (indicating that legislation is "appropriate" where it is "adapted to carry out the objects the amendments have in view"); *McCulloch*, 17 U.S. at 421 ("Let the *end* be legitimate . . . .") (emphasis added). This purpose – which focuses on ends rather than means – should guide the application of the congruence and proportionality test set forth in *Boerne*.

In fact, *Boerne* itself recognizes that the congruence and proportionality test is intended to be used primarily to identify and assess the ends of Section 5-based legislation, rather than question the means Congress employs to achieve proper objectives. As this Court has explained, the *Boerne* test ensures that the "*object* of valid § 5 legislation [is] the . . . remediation or prevention of constitutional violations." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999) (emphasis added). Put simply, it is an inquiry into whether Congress's legislative ends are legitimate.

Under *Boerne*, only a legislative effort to redefine the Constitution exceeds the bounds of Congress's Section 5 enforcement powers. *See* 521 U.S. at 519-20. Thus, the main function of the congruence and proportionality test is to distinguish between an enforcement and a redefinition of a constitutional right.

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

Id.; *see also* Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. Pa. J. Const. L. 1431, 1436 (2009) ("On the appropriateness question, . . . [s]o long as the law really 'enforces' Section 1, rather than chang[es] it, Congress ought to have wide latitude in choosing among enforcement remedies.").

In light of this limited inquiry, this Court has noted that it is "for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Boerne*, 521 U.S. at 536 (internal citations omitted). Thus, in *Boerne*, Congress overstepped its enforcement authority in passing the Religious Freedom Restoration Act only because the legislation was "so out of proportion to a supposed remedial or preven-

tive *object* that it cannot be understood as responsive to, or designed to prevent unconstitutional behavior." *Id.* at 532 (emphasis added).

This focus on the legislation's object – rather than the means to achieve that object – is consistent with the original meaning of the Fourteenth Amendment. *See McCulloch*, 17 U.S. at 421; *see also* Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison, and the Future of Federal Antidiscrimination Law*, 2000 Sup. Ct. Rev. 109, 151-52 (2000) ("The Court introduced the test in *Boerne* – and applied it in *Kimel* and *Florida Prepaid* – as a way to assess whether the object of Section 5-based legislation is legitimate. In other words, the congruence and proportionality test speaks to the question of power in the premises: Is this an issue with regard to which Congress is authorized to act? Understood this way, the congruence and proportionality test is consistent with the Court's traditional deference to Congress under the *McCulloch* standard."). Conversely, where the congruence and proportionality test focuses instead on the *means* Congress employs in pursuing a proper objective, the original meaning is undermined. The rationale behind this approach in *McCulloch* – which afforded "considerable latitude" to Congress – was that the "relation between the action and the end . . . is not always so direct and palpable as to strike the eye of every observer." Joseph Story, Commentaries on the Constitution of the United States 417 (1883).

In accordance with this original understanding of the Fourteenth Amendment's enforcement clause, Congress's choice of means is entitled to substantial deference when applying the congruence and propor-

tionality test. At the core, the test must focus on whether the object itself was proper, not on the means employed to achieve that object. Accordingly, where a court agrees that Congress has acted within the bounds of its enumerated powers – that the end is legitimate, and that the means chosen are plausibly directed to achieving that end – the law should be sustained. *See Hibbs*, 538 U.S. at 737-40.

Properly applied, the congruence and proportionality test demonstrates that the self-care provision – like the FMLA provision at issue in *Hibbs* – involves a valid exercise of Congress's enforcement power under Section 5. Enforcing the broad terms of the Equal Protection Clause, and "extending its guarantee to 'any person,'" the FMLA ensures that state employers "treat citizens as individuals, not as simply components of a . . . sexual class." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring). At the core, the text and legislative history of the FMLA make clear that the self-care provision was designed to fill the gaps of past legislative efforts to eradicate sex discrimination. Thus, it is congruent and proportional to the targeted violation.

In *Hibbs*, this Court explained that Congress's past efforts to enforce a constitutional guarantee affect the proportionality of a given piece of Section 5 legislation. *See* Kevin S. Schwartz, *Applying Section 5:* Tennessee v. Lane *and Judicial Conditions on the Congressional Enforcement Power*, 114 Yale L.J. 1133, 1141 (2005) (noting that "the Hibbs Court applied greater deference by measuring the law's remedial proportionality in light of Congress's coordinate role in enforcement over time"). Therefore, although the

legislation at issue in *Hibbs* presented "across-the-board, routine employment benefit[s] for all eligible employees," this Court determined that Congress was justified in employing broad prophylactic measures "because Congress was confronting the "difficult and intractable problem" of sex discrimination, and previous legislative attempts to tackle this problem – such as Title VII of the Civil Rights Act and the Pregnancy Discrimination Act (the "PDA") – had failed. 538 U.S. at 737. The Court noted that the breadth and gender-neutrality of the family-care provision ensured that leave "would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men." *Id.* For this reason, "Congress' chosen remedy" was "congruent and proportional to the targeted violation." *Id.*

The same analysis holds true here. The text and history of the FMLA establish that the self-care provision, although broad, was congruent and proportional to the legitimate end of eliminating sex discrimination, particularly as it related to pregnant women and single mothers.

First, the provision recognizes that, because of the sex-specific incidence of pregnancy-related illness and disability, personal medical leave is subject to sex discrimination. In crafting the FMLA, Congress left no doubt that it intended to enforce the Fourteenth Amendment's ban on sex discrimination. The goal of the Act, for instance, was to "minimize the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (*including maternity-related*

disability) and for compelling family reasons, on a gender-neutral basis." 29 U.S.C. § 2601(b)(4) (emphasis added).

The legislative history of the Act similarly demonstrates that Congress viewed the self-care provision as an important tool to uproot discrimination against those who might "bear children." *See, e.g.*, S. Rep. No. 102-68, at 35 (1991). For instance, among the serious medical conditions encompassed by the provision, Congress expressly identified pregnancy, miscarriages, complications or illness related to pregnancy, severe morning sickness, the need for prenatal care, and recovery from childbirth. S. Rep. No. 103-3, at 29 (1993) (noting that a "pregnant patient is generally under continuing medical supervision").

In this respect, the self-care provision met a perceived need not addressed by Title VII or the PDA. Specifically, there was a gap in the prior legislative schemes because they did not require the provision of pregnancy-related leave by employers who offered no benefit provisions for leave at all.[7] As such, the self-care provision of the FMLA was necessary to ensure that all employers provided leave for medical conditions related to pregnancy. H.R. Rep. No. 103-8, at 10-11 (1993) (indicating that the FMLA was "designed to fill those gaps [that an] anti-discrimination law by its nature cannot fill").

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[7] It is "not unlawful under the PDA to terminate an employee absent by reason of pregnancy if the employer would have terminated an employee absent by reason of a different temporary disability." *In re Carnegie Ctr. Assoc.*, 129 F.3d 290, 297 (3d Cir. 1997).

The breadth of the self-care provision, moreover, highlights Congress's intent to combat sex discrimination. Although Congress could have required leave for pregnancy-related conditions only, that would have created a disincentive to hire, retain or promote women because only women would take advantage of such leave, thereby reinforcing the stereotype that "[u]ntil a woman passes the child-bearing age, she is viewed by employers as potentially pregnant." H.R. Rep. No. 95-948, at 6-7 (1978); *see also* S. Rep. No. 102-68, at 73 (1991) (economist Deborah Walker testifying that it might be cost-effective to discriminate against women of child-bearing age because these women would end up costing their employer more than they contribute). In this manner, a provision that incorporated only pregnancy-related leave would have perpetuated the very discrimination that Congress sought to prevent. The self-care provision, however, averted this problem and ensured that women were able to take leave for pregnancy-related conditions without fear of discrimination by requiring employers to allow all employees to take leave for serious health conditions. *See* S. Rep. No. 102-68, at 35 (1991) ("Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability."); *see also* S. Rep. No. 103-3, at 16 (1993) ("A law providing special protection to women or any defined group . . . runs the risk of causing discriminatory treatment. [The FMLA],

by addressing the needs of all workers, avoids such a risk.").[8]

Second, in addition to Congress's concern about discrimination against women by virtue of their "potentially pregnant" status, the legislative history also reflects Congress's fears regarding the status of single mothers. In particular, the concern expressed was that single parents, who in most cases are women, might lose their jobs if they were unable to work during the time of a serious health condition. The Senate Report expressly notes that job loss because of illness has a "particularly devastating effect" where a single mother is a head of a household. S. Rep. 103-3, at 11 (1993). As Delegate Eleanor Holmes Norton testified, "[f]or the single parent, usually a woman, losing her job when she is unable to work during a time of serious health condition can often mean borrowing beyond prudence, going on welfare, or destitution for herself and her family." *Id.* at 11-12. Thus, for this "highly vulnerable group," the self-care provision – which provided a "job guarantee for periods when they . . . have serious health conditions" – was "urgently necessary." *Id.* at 12.

The text and legislative history of the FMLA therefore clarify that Congress employed the self-care provision as a nuanced, tactical method of combating sex discrimination. Like the family-care provision,

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[8] Under a sex-neutral approach, employers could anticipate equal use of leave by male and female employees. *See* Donna R. Lenhoff & Sylvia M. Becker, *Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach*, 26 Harv. J. on Legis. 403, 419 (1989). This, in turn, would eliminate the disincentive to hire, retain or promote women of childbearing age.

the self-care provision incorporates across-the-board benefits for all eligible employees, ensuring that leave would no longer be "stigmatized" in a sex-specific manner, and that employers could not evade their obligations by only hiring and promoting men. *See Hibbs*, 538 U.S. at 737. In this respect, the self-care provision works in concert with other FMLA provisions to effectuate the anti-discriminatory purposes of the Act as a whole.[9]

Because the self-care provision plays an integral role in de-stigmatizing leave, it is congruent and proportional to the legitimate end of eliminating sex discrimination. Congress thus had authority to abrogate state sovereign immunity with respect to claims arising under the provision. For this additional reason, Mr. Coleman's claim did not warrant dismissal.

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[9] Although Respondents urged this Court to disregard Congress's overall objective in the FMLA and assume that Congress acted on separate motivations in each FMLA provision, *see* BIO to Petition for Writ of Certiorari 15-17, this proves to be an erroneous and unjustified assumption. In actuality, Congress envisioned the provisions of the FMLA – and the self-care and family-care provisions in particular – to be interrelated and interdependent. *See, e.g.*, H. Rep. No. 102-135, at 27-28 (1991) (noting that the FMLA "protects employees from possible job loss as a result of a serious health condition, including childbirth or the care of a family member").

C. In Light of Congress's Broad Power Under Section 5, the Congruence and Proportionality Test Should Be Reconsidered.

Although Congress's enactment of the self-care provision fits comfortably within the *Boerne* test, it may be appropriate for this Court to reconsider the *Boerne* standard.

A growing body of scholarship since *Boerne* has concluded that the standard outlined in *McCulloch*, as opposed to the congruence and proportionality test, is the proper framework under which to assess congressional enforcement power. *See, e.g.*, Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991, 1002-03 (2008) ("If one were to apply – as one probably should – the then-prevalent, *McCulloch*-driven broad understanding of Congress's powers under the Necessary and Proper Clause to these linguistically similar provisions ('proper'/'appropriate'), one ends up with a truly sweeping assignment of new legislative power to the national government."); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan. L. Rev. 1127, 1196 (2001) ("In the end, it is difficult to develop a satisfactory justification for the [] unique application of heightened means-ends scrutiny in the Section 5 context that can explain *Boerne* and all of its progeny. Given the strong originalist arguments favoring, and the century-plus of judicial decisions embracing, the *McCulloch* standard in the Section 5 context, the congruence and proportionality test seems an . . . anomaly[.]"); *see also* Balkin, *supra*, at 1815 (observing that *Boerne* cannot be squared with the text of Section 5 since "the language of

McCulloch is actually *embedded in the text* of Section 5") (emphasis added).

Under a revised approach that hews to the language, history and purpose of Section 5, the Court would strike down an act of Congress only "if there is a clear opposition between the Constitutional text and the law." Engel, *supra*, at 118-19; *see also McCulloch*, 17 U.S. at 423.[10] As long as a law is reconcilable with the constitutional text, it should stand. This formulation of congressional enforcement power, which allows broad prophylactic measures, would comport with the intent of the Framers, who desired for Congress to have power to enforce constitutional guarantees through any "appropriate legislation" not inconsistent with the Constitution.

* * * * *

In order to bar Mr. Coleman from federal court, this Court must give an expansive interpretation to an Amendment for which the text, history and purpose require a narrow reach (the Eleventh Amendment), and it must give a narrow interpretation to a constitutional provision for which the text, history and purpose require an expansive reach (Section 5 of the Fourteenth Amendment).

Neither approach would comport with constitutional language and legacy. Both approaches would

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[10] This amounts to what has been called a "presumption of constitutionality." McConnell, *supra*, at 185-88; *see also* Calabresi & Stabile, *supra*, at 1435; Estreicher & Lemos, *supra*, at 158.

operate to frustrate democratically determined remedies for democratically proscribed wrongs.

Mr. Coleman should be permitted to proceed in federal court with the right vested in him by Congress.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

DANIEL COLEMAN,

Petitioner,

v.

MARYLAND COURT OF APPEALS; FRANK BROCCOLINA, STATE COURT ADMINISTRATOR; LARRY JONES, CONTRACT ADMINISTRATOR

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF SENATOR TOM HARKIN, REPRESENTATIVE GEORGE MILLER, AND ADDITIONAL MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Senators and Representatives are committed to securing equal opportunity for women in the workplace. *Amici* include 45 current Members of Congress, many of whom played leadership roles in the development of the Family and Medical Leave Act of 1993 ("FMLA" or "the Act"), and two former Members of Congress who were instrumental in the Act's drafting and passage. *Amici* have a strong interest both in ensuring that the federal courts give "much deference" and "wide latitude" to Congress's power to enact legislation to secure the guarantees of the Fourteenth Amendment, and in providing this Court with information regarding Congress's efforts to exercise its power, under Section 5 of the Fourteenth Amendment, to remedy and deter gender discrimination by the States through the enactment of the FMLA.

INTRODUCTION AND SUMMARY OF ARGUMENT

With the Family and Medical Leave Act, Congress sought "to promote the goal of equal employment opportunity for women and men." 29 U.S.C. § 2601(b)(5).

At the time of passage, the Act guaranteed employees temporary leave in four situations:

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[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than *amici* and its counsel made a monetary contribution to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
>
> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
>
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1)(A)-(D).

The enactment of these leave benefits was the culmination of nearly two decades of legislative efforts to remedy persistent gender inequalities in the workplace. While Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978 had "far-reaching" effects on such discrimination, Congress concluded that "much remains to be done." H.R. Rep. No. 102-40, pt. 1, at 16 (1991); H.R. Rep. No. 103-8, pt. 2, at 8-9 (1993). After developing an extensive record through hearings over many years concerning women's employment opportunities, Congress designed the FMLA to fill important gaps in Title VII and the PDA.

In particular, Congress adduced evidence regarding the disproportionate impact that inadequate employee-leave policies had on women because of the increasing frequency with which they served as both family caretakers and breadwinners. In the text of the Act itself, Congress announced its finding that "the primary responsibility for family caretaking

often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5). This was coupled, however, with the trend that "the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly." *Id.* § 2601(a)(1). The legislative record showed that women were far more likely than men to be at the head of these single-parent households. *See* S. Rep. No. 103-3, at 5, 10 (1993).

Accordingly, Congress recognized that, due to competing work and family responsibilities, women, in particular single heads of household, felt the effect of catastrophic events—whether raising a newborn, caring for a sick parent, enduring a problematic pregnancy, or facing serious illness—more gravely than men. *See id.* at 10 ("'For this highly vulnerable group, whose numbers have exploded, a job guarantee for periods when they or their children have serious health conditions is urgently necessary'") (quoting Eleanor Holmes Norton).

Despite the devastating consequences that women faced under these circumstances, employers continued to afford them inadequate protection. Congress found a "lack of employment policies to accommodate working parents" and "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(3) & (4); *see also* S. Rep. No. 103-3, at 12-13 (examining studies indicating that "a significant percentage of employers of all sizes have yet to adopt [family and medical leave] policies," and that "150,000 workers lose their jobs each year due to the lack of medical leave alone").

In light of these findings, Congress identified as goals of the FMLA:

> [T]o balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
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> . . .
>
> to entitle employees to *take reasonable leave for medical reasons*, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.

29 U.S.C. § 2601(b)(1)-(2) (emphasis added).

The FMLA's text and history thus make clear that Congress designed the Act to eliminate the need for women to choose between family and work by affording leave to mitigate the disproportionate impact that women faced both *during* pregnancy *and* when *either* they or their family members became seriously ill.

The legislative record also supported Congress's decision to extend the leave benefits on a gender-neutral basis. Congress concluded that, if the benefits were provided only to women, employers might avoid hiring women altogether. *See* H.R. Rep. No. 102-135, pt. 1, at 30 (1991) ("A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment," where "[e]mployers might be less inclined to hire women"). Accordingly, Congress made clear that it intended to provide benefits for the "eligible" family-related and medical reasons a woman might need to take a leave, and to provide this benefit on a gender-neutral basis; it designed the Act:

> to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex *by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability)* and for compelling family reasons, on a gender-neutral basis.

29 U.S.C. § 2601(b)(4) (emphasis added).

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), this Court held that Congress validly abrogated the States' sovereign immunity from damages in the context of a lawsuit brought under Subsection C of the FMLA, the family-leave provision. In so ruling, *Hibbs* recognized that the FMLA, *as a whole*, "aims to protect the right to be free from gender-based discrimination in the workplace," a purpose that was "clear" from the text of the Act itself. *Id.* at 728, n.2 (citing 29 U.S.C. § 2601(a)(5), (b)(4) & (5)). The Court explained that gender-based classifications such as those targeted by the FMLA face heightened scrutiny, which made it "easier for Congress to show a pattern of state constitutional violations." *Id.* at 736. The Court acknowledged, as Congress had found, that, as of the passage of the FMLA, "States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits." *Id.* at 730. As a result, the Court held that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation." *Id.* at 735. In light of the extensive record of discriminatory administration of leave

benefits generally, the Court found that the Act's leave provisions, including the family-care provision, constituted a proportional deterrent to this constitutional harm. *Id.* at 737. The Court identified numerous limitations on the breadth of the family-care provision that ensured that the remedy was congruent to the significant constitutional evil of gender discrimination in the workplace. *Id.* at 737-40. These limitations apply equally to all of the types of leave, including medical leave, that the Act provides.

The Court of Appeals below, and several other appellate courts, erred in concluding that the analysis in *Hibbs* does not control the matter at hand: whether the States are likewise subject to damages suits when they deny their employees the leave that Congress provided under the FMLA's medical-leave provision (29 U.S.C. § 2612(a)(1)(D)).[2] To arrive at this incorrect result, these courts misapplied this Court's three-step test for whether prophylactic Section 5 legislation validly abrogates sovereign immunity. In particular, the lower courts misinterpreted this Court's Section 5 jurisprudence as requiring Congress to create a detailed legislative record with evidence sufficient to justify its Section 5 authority as to each remedial subsection in the Act,

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[2] *See* Pet. App. 13-14; *Nelson v. Univ. of Tex.*, 535 F.3d 318 (5th Cir. 2008); *Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 422 F.3d 392 (6th Cir. 2005); *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871 (7th Cir. 2006); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007) (per curiam); *McKlintic v. 36th Judicial Circuit Court*, 508 F.3d 875 (8th Cir. 2007) (per curiam); *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003).

rather than looking to the record underlying the Act as a whole.[3]

Contrary to these lower courts' reasoning, this Court has repeatedly indicated that the Section 5 analysis turns on the sufficiency of the legislative record with respect to the *right* at issue—not with respect to the particular remedial provision under which a plaintiff brings suit. Where, as here, a statute seeks to deter a singular constitutional wrong—gender discrimination in the workplace—courts must review the Act, and the record underlying the Act, as a whole to determine the appropriateness of Congress's prophylactic measures.

Thus, when this Court found in *Hibbs* that Congress had adduced sufficient evidence to warrant prophylactic legislation addressing the administration of leave benefits, that ruling was dispositive on all suits seeking damages for denial of leave in one of the situations Congress found necessary to remedy gender discrimination in the workplace. So too, *Hibbs*'s analysis that the FMLA's remediation of gender discrimination in the workplace was congruent and proportional is controlling here.

Even if the court below were correct that Congress had the burden of identifying, in isolation, state discriminatory conduct in the provision of medical leave—Congress met that burden. Congress adduced ample evidence of the disproportionate impact felt by women when they cannot work due to illness or pregnancy, and of the inadequacy of existing laws and plans to protect women in these situations.

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[3] This Court presumptively construes statutes not "by a single sentence or member of a sentence, but [by] look[ing] to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850).

Congress also appropriately afforded medical leave on a gender-neutral basis, to ensure that women were not shut out of the workplace by virtue of this federally-protected leave.

ARGUMENT

I. *HIBBS*'S HOLDING THAT CONGRESS VALIDLY ABROGATED STATES' SOVEREIGN IMMUNITY FROM DAMAGES SUITS FOR DENIAL OF FAMILY-LEAVE UNDER THE FMLA ALSO APPLIES TO SUITS TO ENFORCE THE ACT'S MEDICAL-LEAVE PROVISION.

A. Courts Must Give Congress "Much Deference" And "Wide Latitude" To Enact Prophylactic Legislation Under Section 5 Of The Fourteenth Amendment.

To understand how the court below erred in applying the test for abrogation of state sovereign immunity pursuant to Section 5, it is necessary first to articulate the test.

The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

"The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363 (2001).

This principle of state sovereignty, however, is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick v.*

Bitzer, 427 U.S. 445, 456 (1976) (citation omitted); *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000). Congress may "abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Hibbs*, 538 U.S. at 726.

Congress's intention to abrogate the States' immunity from suits under the FMLA "is not fairly debatable." *Ibid.*; *see* 29 U.S.C. § 2617(a)(2) (establishing that the right of action "to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (*including a public agency*) in any Federal or State court of competent jurisdiction") (emphasis added). The only remaining question is whether the FMLA and its medical-leave provision was a valid exercise of Congress's Section 5 power.

The Fourteenth Amendment provides, in relevant part:

> *Section 1.* . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> *Section 5.* The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

"[Section] 5 is an affirmative grant of power to Congress." *Kimel*, 528 U.S. at 80. "It is for Congress

in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to *much deference*." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (emphasis added) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

In enacting "appropriate legislation" enforcing Fourteenth Amendment rights, "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365; *see also Kimel*, 528 U.S. at 81 ("Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment"). Rather, Congress's enforcement power includes the authority "both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81. Accordingly, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Hibbs*, 538 U.S. at 727-28; *see also Kimel*, 528 U.S. at 88 ("Difficult and intractable problems often require powerful remedies").

This Court has emphasized that, in acting pursuant to the enforcement power, Congress must respect the "line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Boerne*, 521 U.S. at 519. At the same time, however, the Court has recognized that this line "is not easy to discern" and thus, "Congress must have *wide latitude* in determining where it lies." *Id.* at 519-20 (emphasis added).

In *Boerne*, this Court articulated the standard for whether prophylactic Section 5 legislation falls on the right side of that line: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. The Court has identified three steps for assessing whether legislation satisfies this standard.

"The first step of the *Boerne* inquiry requires us to *identify the constitutional right* or rights that Congress sought to enforce" when enacting the legislation. *Tennessee v. Lane*, 541 U.S. 509, 522 (2004) (emphasis added); *see also Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) ("we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy"). This analysis must be done "with some precision." *Garrett*, 531 U.S. at 365.

In identifying the constitutional right at step one, the Court also assesses the level of scrutiny afforded to alleged violations of that right. Gender discrimination is "subject to heightened scrutiny." *Hibbs*, 538 U.S. at 728; *see also, Garrett*, 531 U.S. at 365-66 (finding at step one that the right at issue in Title I of the ADA is afforded "rational-basis review" by looking "to our prior decisions under the Equal Protection Clause dealing with this issue").

For the second step, the Court "inquire[s] whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area." *Hibbs*, 538 U.S. at 729. A record of constitutional violations may be established by reference to, *inter alia*, "judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence." *Lane*, 541 U.S. at 529; *see also Hibbs*, 538

U.S. at 729-35. This record need not "be predicated solely on evidence of constitutional violations by the States themselves." *Lane*, 541 US. at 527 n.16; *see Hibbs*, 538 U.S. at 730 (citing survey of private-sector employees). Moreover, the Court gives weight both to Congress's findings "in the text of the [statute] itself" as well as the legislative record that underlies it. *Lane*, 541 U.S. at 529.

Although this Court expects more than "scant" evidence of constitutional violations in the legislative record, it does not require a detailed, state-by-state record. *Compare Fla. Prepaid*, 527 U.S. at 646 (noting "scant" evidence of constitutional violations related to target of Patent and Plant Variety Protection Remedy Clarification Act insufficient), *with Hibbs*, 538 U.S. at 735 (finding record sufficient with respect to FMLA), *and Lane*, 541 U.S. at 528 (same with respect to Title II of the ADA). As explained outside the Section 5 context, "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (Kennedy, J., plurality opn.).

Moreover, it is "easier for Congress to show a pattern of state constitutional violations" where, as here, the classifications are subject to heightened scrutiny. *Hibbs*, 538 U.S. at 736; *see also*, *Lane*, 541 U.S. at 528-29 ("We explained [in *Hibbs*] that because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of scrutiny, 'it was easier for Congress to show a pattern of state constitutional violations'").

The Court does not require evidence of violations by each of the 50 States to justify abrogation. *See, e.g.*, *Lane*, 541 U.S. at 524-29 (finding evidence sufficient

without state-by-state analysis). Indeed, the burden on Congress to establish state violations of constitutional rights must remain sufficiently limited to avoid causing the precise type of conflict between state and federal authority that *Boerne* sought to avoid. *Id.* at 537 (Ginsburg, J., concurring) ("It seems to me not conducive to a harmonious federal system to require Congress, before it exercises authority under § 5 of the Fourteenth Amendment, essentially to indict each State for disregarding the equal citizen-citizenship stature of persons with disabilities").

Finally, at step three of the *Boerne* analysis, the Court considers whether "Congress' chosen remedy" is "'congruent and proportional to the targeted violation.'" *Hibbs*, 538 U.S. at 737 (quoting *Garrett*, 531 U.S. at 374). This turns on whether the legislation "is an appropriate response to th[e] history and pattern of unequal treatment." *Lane*, 541 U.S. at 530.

B. As In *Hibbs*, The FMLA Viewed As A Whole Satisfies The *Boerne* Test.

Because the court below, and other federal courts, misapplied the preceding test, they incorrectly concluded that the analysis in *Hibbs* pertains only to the FMLA's family-care leave provision, not its medical-leave provision. *See* Pet. App. 11 ("The Court's analysis, focused as it is on the gender-related nature of § 2612(a)(1)(C), does not support the validity of Congress's abrogation of sovereign immunity for violations of § 2612(a)(1)(D)."); *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1157, 1164 (10th Cir. 2003); *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871, 879 (7th Cir. 2006). These courts both (1) erroneously imposed a burden on Congress to adduce detailed evidence sufficient to support each remedial subsection in the Act, rather than evidence

supporting the Act's remedial goals as a whole, and (2) failed (even under their flawed interpretation) to evaluate Subsection D in light of the language, structure, purpose, and history of the Act to determine whether to uphold Congress's expressed intent to abrogate state sovereign immunity for violations of Subsection D.

1. Step One—Identifying The Constitutional Right

Properly applied, at step one, the question regarding the constitutional right at issue results in the same answer here as in *Hibbs*—"[t]he FMLA aims to protect the right to be free from gender-based discrimination in the workplace." *Hibbs*, 538 U.S. at 728. As *Hibbs* explained:

> The text of the Act makes this clear. Congress found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." In response to this finding, Congress sought "to accomplish the [Act's other] purposes . . . in a manner that . . . minimizes the potential for employment discrimination *on the basis of sex* **by ensuring generally that leave is available** . . . *on a gender-neutral basis[,]* and to promote the goal of equal employment opportunity for women and men."

Id. at 728 n.2 (quoting 29 U.S.C. § 2601(a)(5), (b)(4) & (5)) (emphasis in bold added; citation omitted).

Congress sought both to remedy decades of workplace discrimination against women, and to ensure that its remedy did not exacerbate that

intractable problem. Policies allowing some leave were not always equally available to men and women, and policies that denied anyone leave had a disproportionate impact on women. Congress found that women were serving as single heads of household more frequently than men, while still bearing greater family responsibilities, and that women faced greater consequences in the face of the serious medical issues suffered by them *or* their families. *See* 29 U.S.C. § 2601(a)(1), (a)(5); S. Rep. No. 103-3, at 5, 10. The Act thus aimed to ensure leave for family reasons and for personal medical reasons, including pregnancy. *See* 29 U.S.C. § 2601(b)(1)-(2).[4]

Nowhere does the Act suggest that providing leave only for family reasons, but not for medical reasons, will be sufficient to remedy the intractable problem of gender discrimination in the workplace. Such a notion is irreconcilable with the very title of the Act—"Family and Medical Leave Act." The language and history confirm the reasonableness of Congress's judgment that protection of an employee's job while taking leave, whether for family or medical reasons, was critical to achieving the Act's goals.

Because Congress intended the FMLA to eliminate gender discrimination, Congress's efforts must be adjudged against the backdrop of "heightened scrutiny" applied to "statutory classifications that distinguish between males and females." *Hibbs*, 538 U.S. at 728.

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[4] Congress recognized pregnancy was associated with numerous health issues, often necessitating care for weeks before and after childbirth. *See* H.R. Rep. No. 102-135, pt. 1, at 44.

2. Step Two—Evidence Of A Pattern Of Violations

At step two, given "*this common foundation* that, as Congress found, has historically produced discrimination in the hiring and promotion of women," *Hibbs* relied on evidence pertaining to inequities and infirmities in the administration of leave benefits generally, not just in family-care leave, to conclude that Congress had adduced sufficient evidence of constitutional violations to justify its prophylactic power. *Hibbs*, 538 U.S. at 731 n.5 (emphasis added). The same evidence cited in *Hibbs* therefore supports a finding that Congress adduced sufficient evidence to support its express decision to abrogate state sovereign immunity against damages actions for violations of the rights provided under Subsection D.

There are few instances in *Hibbs* where the Court cited evidence related exclusively to family-care leave. *See id.* at 728-36. Instead, *Hibbs* cited evidence of the inadequacy and disproportionate impact of limitations of leave in all four protected areas, as well as evidence applicable to inadequate leave as a whole:

- Bureau of Labor Statistics data regarding the lack of "maternity leave policies" in the private sector. *Id.* at 730 (relating to Subsections A, B, D).
- Congressional testimony regarding the rarity of "'[p]arental leave for fathers.'" *Id.* at 731 (Subsection A, B).
- A state reference guide assessing several States' plans, finding "[m]any States offered women extended 'maternity' leave that far exceeded the typical 4-to 8-week period of physical disability *due to pregnancy* and

childbirth, but very few States granted men a parallel benefit." *Ibid.* (emphasis added) (Subsections A, B, C, D).

- Congressional testimony showing that "child care leave" *and* "maternity leave" was often afforded only to women. *Id.* at 731 n.5 (Subsections A, C, D).
- Congressional testimony regarding the discriminatory application of facially neutral leave policies, including about "'[t]he lack of uniform parental *and medical leave* policies in the work place.'" *Id.* at 732 (emphasis added) (Subsections A, B, C, D).
- The existence of state-leave programs that were deficient for numerous reasons includeing "childcare leave provisions that applied to women only." *Id.* at 733 (Subsections A, B, C, D).
- Congressional testimony regarding the impact of stereotypes underlying the targeted discrimination—"'[t]his prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers *or mothers-to-be*.'" *Id.* at 736 (emphasis added) (Subsections A, B, D).
- Anecdotal evidence that "stereotypes . . . fostered employers' stereotypical views about women's commitment to work and their value as employees." *Ibid.* (Subsections A, B, C, D).

On this record, *Hibbs* found at step two that Congress's extensive evidence pertaining to unequal administration of leave benefits generally justified a

prophylactic response. "In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination *in the administration of leave benefits* is weighty enough to justify the enactment of prophylactic § 5 legislation." *Id.* at 735 (emphasis added). This was particularly so because Congress was acting in the context of gender discrimination. *Id.* at 730 ("The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, as in *Fitzpatrick*, the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation").

By ignoring the "common foundation" supporting the four leave provisions discussed in *Hibbs*, the lower courts erred in ruling that only evidence specific to medical leave was relevant to step two of the *Boerne* analysis. The court below, and several other federal courts, held that "Congress did not adduce any evidence establishing a pattern of the states as employers discriminating *on the basis of gender in granting leave for personal reasons.*" Pet. App. 12 (emphasis added).[5] That is not merely factually incorrect (Congress did adduce such evidence as discussed in Section II, *infra*), but it asks the wrong question. The lower court should not have limited its review to evidence related only to medical leave, rather than to the record of workplace discrimination against women, and the impact of

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[5] *See also Touvell*, 422 F.3d at 399 n.2 (finding that Congress did not provide any "concrete evidence" to "justify the self-care provision of the Act *solely* on the basis of the possibility that such discrimination might also impact self-care leave") (emphasis added); *Toeller*, 461 F.3d at 879; *Brockman*, 342 F.3d at 1164.

inadequate leave benefits in exacerbating that intractable problem.

3. Step Three—Congruence And Proportionality Of The Remedy

At step three, as well, the result here must be the same as in *Hibbs*: the FMLA's remedial scheme is "congruent and proportional" to addressing the harm of gender discrimination in the workplace.

Hibbs cited these aspects of the family-care provision in concluding that it was "congruent and proportional": (1) available equally to men and women, (2) "affects only one aspect of the employment relationship," (3) limited to employees "who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months," (4) unavailable to "[e]mployees in high-ranking or sensitive positions," (5) unavailable to elected officials, (6) requires advance notice from the employee, (7) requires certification from a health care provider, (8) only extends 12 weeks, (9) limits damages to "actual monetary losses," (10) limits backpay to the two-year statute of limitations. *Hibbs*, 538 U.S. at 737-40. Each applies equally to Subsection D.[6]

The court below and other federal courts have apparently drawn great significance from *Hibbs*'s framing of its holding at this third step. The Court

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[6] *See* 29 U.S.C. §§ 2612(a)(1)(D) (available to men and women), 2612 (single aspect of employment relationship), 2611(2)(A) (one year's work and 1,250 hours work within year), 2611(2)(B)(i) & 2611(3) (unavailable to high-ranking employees), 203(e)(2)(C) (unavailable to elected officials), 2612(e) (advance notice); 2613 (requires physician certification), 2612(a)(1) (12 weeks), 2617(a)(1)(A)(i)-(iii) (damages only actual monetary losses), 2617(c)(1) (backpay limited to two years).

stated that "we conclude that § 2612(a)(1)(C)"—rather than the entire Act—"is congruent and proportional to its remedial object." *Id.* at 740; *cf.* Pet. App. 13; *Brockman*, 342 F.3d at 1164; *Toeller*, 461 F.3d at 879.

Yet, given that the medical-leave provision has the exact same features as the provision found proportional in *Hibbs*, it is ultimately not determinative whether the Court purported to engage in a 'facial' or 'as applied' analysis at step three. Either way, the Court's analysis of whether Congress acted within its "wide latitude" to adopt prophylactic measures in the FMLA to remedy gender discrimination is controlling.

C. *Lane* Does Not Dictate A Different Result.

In addition to misreading *Hibbs*, the lower courts have erred in construing the Court's decision in *Lane*, *supra*, to mandate an 'as applied' or 'subsection by subsection' analysis of the FMLA's medical-leave provision. *See* Pet. App. 13 ("we know of no basis for adopting such an undifferentiated analysis or concluding that the *Hibbs* Court did so") (citing *Lane*, 541 U.S. at 530-31); *Touvell*, 422 F.3d at 400 n.3 ("The Supreme Court has made clear, however, that this type of line-drawing is a valid and necessary function of the courts," citing *Lane*). Not so.

Lane considered whether Title II of the ADA, which relates to "public services, programs, and activities," was a valid exercise of Congress's Section 5 enforcement power. *Lane*, 541 U.S. at 516-17, 522. The Court concluded that Title II, "as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of

Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Id.* at 533-34.

Both the majority and a dissenting opinion explained that the Court had never performed, nor needed to perform, such line drawing prior to *Lane*, because the statutes all involved only one constitutional right.[7] In the Section 5 cases from *Boerne* to *Hibbs*, the Court evaluated statutes that address singular constitutional goals—and it did so each time by considering the record as a whole.[8] Even in *Lane*, when evaluating the legislative record supporting Congress's prophylactic power, the Court relied on evidence about the access of disabled persons to public services generally, not just related to courthouses. *See Lane*, 541 U.S. at 524-25 (discussing marriage, jury service, imprisonment, education, and voting).

The Court has thus consistently held that the record supporting a statute that seeks to enforce one constitutional right should be reviewed as a whole. There is no reason to abandon that rule now. *Cf.*

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[7] By contrast, Title II "seeks to enforce a *variety* of other basic constitutional guarantees." *Lane*, 541 U.S. at 522 (emphasis added); *see also id.* at 530 ("Title II—unlike . . . other statutes we have reviewed for validity under § 5—reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees"); *id.* at 540 (Rehnquist, C.J., dissenting) ("This task was easy in *Garrett*, *Hibbs*, *Kimel*, and *City of Boerne* because the statutes in those cases sought to enforce only one constitutional right").

[8] *See Kimel*, 528 U.S. at 91 (finding "legislative record *as a whole*, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age") (emphasis added); *Boerne*, 521 U.S. at 529; *Fla. Prepaid*, 527 U.S. at 646; *Garrett*, 531 U.S. at 368.

United States v. IBM, 517 U.S. 843, 856 (1996) ("we frequently have declined to overrule cases in appropriate circumstances because *stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. [E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification'") (quotation marks and internal citation omitted).

Of course, there may be future cases involving statutes like Title II that target multiple constitutional evils, which demand the courts to draw lines, and for those statutes, *Lane*'s analysis will control. But the lines will be defined by the *rights* Congress sought to vindicate, not by the particular remedial subpart under which a plaintiff files suit. *See* Kevin S. Schwartz, *Applying Section 5: Tennessee v. Lane and Judicial Conditions on the Congressional Enforcement Power*, 114 Yale L.J. 1133, 1155 (2005) ("*Lane*'s as-applied methodology differs critically from a purely fact-based as-applied ruling. In testing the rights condition, the *Lane* Court did not limit its finding to the particular facts presented by George Lane or others. That is because Congress's power to pass a Section 5 law hinges not on the facts of a case, but rather on the constitutional right or rights at stake.").

Any other rule would transform the test for the validity of Congress's exercise of its constitutional power under Section 5 of the Fourteenth Amendment into one that depended on formalistic distinctions. For example, even if Congress had organized the protections of Title II into a single section, the Court

presumably still would have asked whether the abrogation was valid as applied to courthouse access. Here, the fact that Congress drafted the FMLA's remedial scheme in four subparts rather than in one should not dictate that Congress needed to adduce a separate body of evidence pertaining to each subpart, particularly where all subparts address continuing gender discrimination in the workplace by providing gender-neutral leave.

II. EVEN VIEWING SUBSECTION D IN ISOLATION, AMPLE EVIDENCE SHOWS THAT THIS SUBSECTION WAS A CONGRUENT AND PROPORTIONAL RESPONSE TO GENDER DISCRIMINATION IN THE WORKPLACE.

Even if this Court were to agree with the lower court that the FMLA's medical-leave provision must be analyzed in isolation to determine if it falls within Congress's Section 5 power, the Court should still validate that provision as a congruent and proportional response to gender discrimination in the workplace. Although the lower court nominally applied *Boerne*'s three-step analysis, it did not evaluate the statute's language and legislative history in any detail, or afford Congress the broad deference and wide latitude that courts must give to Congress's express invocation of its authority under Section 5.

A. The Purpose Of The Medical-Leave Provision Was To Eliminate Gender Discrimination.

The text of the Act shows, for purposes of step one, that Congress intended to address gender discrimination in the workplace in significant part through the provision of leave for medical reasons, including pregnancy. As the Act's title also confirms,

medical leave was central to the protections Congress adopted to serve the overarching purpose "to promote the goal of equal employment opportunity for women and men." 29 U.S.C. § 2601(b)(5). Congress articulated findings in the Act about women's dual roles in the home and office. *See id.* § 2601(a)(1), (5). Congress also announced findings of inadequacies in current medical-leave policies. *See id.* § 2601(a)(4). Thus, to further a broader goal of eliminating gender discrimination, the Act includes the aim of "entitl[ing] employees to take reasonable leave for medical reasons [and] for the birth or adoption of a child." *Id.* § 2601(b)(2).

The legislative history supports the text. Congress was aware that neither the Pregnancy Discrimination Act (PDA) nor Title VII had ended gender discrimination in either the affording of leave, or the disproportionate impact of inadequate leave. The PDA amended Title VII to require employers to treat pregnancy similarly to other reasons for leave, and preclude them from explicitly excluding pregnancy from coverage. *Cf. Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 138-39 (1976); 42 U.S.C. § 2000e(k). But merely outlawing such exclusion proved insufficient to provide women the leave they needed to participate fully in the workplace, whether that leave was for personal medical reasons (including, but not limited, to pregnancy) or for family-related reasons. Congress's answer to this was the FMLA. As the House Report states, "*[p]erhaps most importantly*, [the Act] addresses the needs of the most vulnerable of wage earners, the single woman head of household." H.R. Rep. No. 103-8, pt. 2, at 22 (emphasis added).

For example, Congress heard testimony that:

> Our work with PDA [Pregnancy Discrimination Act] enforcement has made us painfully aware that those with minimum or no coverage tend disproportionately to be women and nonwhite, concentrated in industries where wages are low and women predominate. And we are especially concerned with the more than 6.4 million women who are single heads of household for whom, along with their financially precarious families, lack of job protection renders illness a catastrophe. The Parental Leave and Disability Act [a precursor to the FMLA] would fill that gap by creating a reasonable time period during which *an absence from work for medical reasons* cannot result in termination of an employee.

Parental and Disability Leave: Joint Hearing H.R. 2020 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of the H. Comm. on Post Office and Civil Serv. and the Subcomm. on Labor Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor, 99th Cong. 8 (1985) (statement of Professor Wendy Williams) (emphasis added).[9]

Although Congress was concerned in Subsection D about ensuring affirmative provision of leave for pregnancy, Congress also recognized denial of leave for other medical reasons obstructed women's ability to participate equally in the workplace. The Act's broad provision of leave:

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[9] *See, e.g.*, Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929 (1985) (discussing need for disparate-impact action under PDA).

> means that one of the risks that currently faces families planning to have children—*the risk of job loss of the mother*—is eliminated. . . . It means that women deciding whether to bear children can be secure in knowing that they *can* continue their incomes after childbirth and the attendant disability period is over.

The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the H. Comm. on Educ. and Labor, 99th Cong. 104 (1986) (first emphasis added).

Other testimony explained that affording women leave prior to childbirth was critical to achieve equal opportunity in the workplace:

> [I]ts provision for temporary medical leave would ensure that new mothers don't lose their jobs when they temporarily cannot work due to pregnancy—and childbirth—related disability (as part of ensuring that employees in general do not lose their jobs when they are temporarily unable to work because of a serious health condition).

S. Rep. No. 102-68, at 23 (1991); *see also* H.R. Rep. No. 102-135, pt. 1, at 45-46 (articulating that pregnancy-related disability was one of the conditions protected by the new medical-leave provision).

Nevertheless, the lower court suggested that the medical-leave provision was *not* targeted at eliminating gender discrimination in the workplace, because there was evidence in the "legislative history" regarding additional benefits of the medical-leave provision, including "alleviat[ing] the economic effect on employees and their families of job loss due to sickness and also to protect employees from being

discriminated against because of their serious health problems." Pet. App. 12; *see also Brockman*, 342 F.3d at 1164. That Congress identified benefits of the medical-leave provision beyond the eradication of gender discrimination, however, does not change the fact that Subsection D—and the Act as a whole—was designed to address that one constitutional wrong. For example, *Hibbs* found that Subsection C targeted gender discrimination even though it could be argued that affording family-care leave had the additional aim of ensuring the availability of caretakers for the elderly. *See, e.g.*, 29 C.F.R. § 825.101(b) ("Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work."); H.R. Rep. No. 103-8, pt. 1, at 38 (discussing conditions suffered by elderly that necessitate care). To hold otherwise would restrict Congress, when protecting fundamental rights, only to those remedies that would have no ancillary beneficial purposes or effects. Nowhere does the Constitution impose such a counter-productive limitation on Congress's Section 5 power.

The lower court and other courts have similarly been misled by the fact that Subsection D provides leave benefits on a gender-neutral basis for illnesses to which women and men are equally susceptible. This does not mean, as these courts concluded, that the provision of such leave was unrelated to the goal of eliminating and deterring gender discrimination. To the contrary, the record is overwhelmingly clear that the remedy had to be gender-neutral to avoid a pill that was worse than the poison:

> Another significant benefit of the *temporary medical leave* provided by this legislation is the form of protection it offers women workers who bear children. *Because the bill treats all*

> *employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability.*

S. Rep. No. 102-68, at 30 (emphasis added).

Indeed, the legislative record abounds with evidence that Congress was wary of indirectly locking women out of the workplace by singling them out for protection. For example, the 1991 House Report indicated:

> A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. Employers might be less inclined to hire women or the members of any group provided special treatment. For example, legislation addressing the needs of pregnant women only might encourage discriminatory hiring practices against women of child bearing age. Legislation addressing the needs of all workers equally does not have this effect.

H.R. Rep. No. 102-135, pt. 1, at 30; *see also* H.R. Rep. No. 101-28, pt. 1, at 14 (1989).

The framing of the medical-leave provision as gender-neutral therefore does not mean that Congress had abandoned its intent to address workplace gender discrimination; such neutrality was essential for ensuring that the Act would actually help women rather than provoke further discrimination:

> Faced with the knowledge that *job-protected leaves* were required for working mothers and working mothers only, employers would very

> likely be reluctant to hire or promote women of child-bearing age. Under the proposed legislation, however, *because employers would be required to provide job-protected leaves for all employees in circumstances that affect them all approximately equally, they would have no incentive to discriminate against women.*

Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of the H. Comm. on Post Office and Civil Serv. ("Hearing on H.R. 925"), 100th Cong. 39 (1987) (supplemental statement of Professor Eleanor Holmes Norton) (emphasis added, footnote omitted).

B. Congress Adduced Sufficient Evidence That Women Were Disproportionately Harmed By Inadequate Medical Leave.

In what ostensibly was step two of its analysis, the lower court found that 'even if' Subsection D targeted gender discrimination, there was no evidence of a pattern of discriminatory conduct in the administration of medical leave. Pet. App. 12. The lower court drew this sweeping conclusion about years of legislative effort without citing even a single-piece of the legislative record. *Ibid.* Due deference for Congress's efforts to enforce Section 5 requires far more.

The legislative record contains ample evidence—particularly when considering the heightened scrutiny applicable to gender issues—of the way in which the administration of medical leave in the workplace denied women equal opportunity in the

workplace.[10] It shows: (1) the increasing and disproportionate representation of women as single heads of household; (2) the influence of gender stereotypes in subjecting women to unequal pay and discriminatory employment policies; and (3) the inadequacy of existing laws for remedying the disproportionate impact upon women of inadequate leave policies.

1. The congressional reports for the FMLA detail Congress's awareness that the number of women in the workforce had dramatically increased:

> In its Corporate Reference Guide to Work-Family Programs, the Families and Work Institute predicts that by 1995, two-thirds of women with pre-school children and three-quarters of the women with school-age children will be in the labor force. Today, according to the Bureau of Labor Statistics, 96 percent of fathers and 65 percent of mothers work outside the home. The participation of women in the labor force was 19 percent in 1900; today 74 percent of women aged 25-54 are in the labor force. Fifty-six percent of mothers with children under age six and 51 percent of mothers with children under age one are in the labor force.

S. Rep. No. 103-3, at 4.

Congress also adduced compelling statistical evidence that, not only were women working more, but they were more frequently serving either as single heads of households or responsible for an important share of the financial burden in low-

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[10] As in *Hibbs*, the legislative record over a number of years is relevant here. *See Hibbs*, 538 U.S. at 731 nn.4-5 (citing history of PDA and 1987 FMLA-precursor); *id.* at 732-33 (citing history of 1991 FMLA-precursor).

income households. *See* S. Rep. No. 102-68, at 22 ("Two out of every three women working outside the home today are either the sole providers for their children or have husbands who earn less than $18,000 a year. . . . The new economic reality is that today's families depend on a woman's income to survive."). A substantial increase in "[d]ivorce, separation, and out-of-wedlock births" meant that "millions of women [were] struggl[ing] as single heads of households to support themselves and their children," and such women "often cannot keep their families above the poverty line. H.R. Rep. No. 103-8, pt. 1, at 26. [11]

Congress identified the unique pressures faced by such single-women heads of household. Although "[t]he need for job protected medical leave arose long before the dramatic new changes in the work force. . . . such losses are felt more today." S. Rep. No. 103-3, at 6; *see also* H.R. Rep. No. 103-8, pt. 1, at 27. For a woman heading a household alone or providing vital support to a low-income family, "the loss of [her] job *because of illness* can have devastating consequences." S. Rep. No. 103-3, at 6 (emphasis added).

Further underscoring the size and vulnerability of this large swath of working women, Congress noted

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[11] Women's participation in the workforce is close to its highest during the years that women tend to be pregnant or give birth. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Women in the Labor Force, A Databook*, 5 tbl. 1 (2006), *available at* http://www.bls.gov/cps/wlf-databook-2006.pdf (70-73% of women ages 20-34 are in the labor force); Barbara Downs, U.S. Census Bureau, *Current Population Reports: Fertility of American Women: June 2002*, 2 tbl. 1 (Oct. 2003), *available at* http://www.census.gov/prod/2003pubs/p20-548.pdf (by age 34, 72.4% of women have had at least one child).

that "[i]n 1987, 20 percent of all children under age six lived with single mothers. The poverty rate among these young children was 61.4 percent, more than five times the poverty rate of 11.6 percent among children living in two-parent families." H.R. Rep. No. 103-8, pt. 1, at 26.

2. Congress also found that the increase in women wage-earners was taking place against a backdrop of continuing, intractable, and pervasive gender discrimination in the workplace. Such disparate treatment was evident in unequal pay *and in* discriminatory employment policies. Congress learned, for example, that women "still earn[ed] on average only two thirds of what white males earned," and that "roughly half of this earnings gap may [have been] attributable to discriminatory employment practices." H.R. Rep. No. 102-40, at 20-21. In addition to "substantial sex segregation" between occupations or job titles, women earned less than men in nearly every occupation. *Ibid.* Congress also had before it evidence that women workers "remain in female intensive, relatively low paid jobs *and are less likely than men to have adequate job protections and benefits.*" H.R. Rep. No. 101-28, pt. 1, at 5 (emphasis added).

The absence of adequate medical leave policies, particularly for women, had a significant impact on women's earnings. One study found that "workers without leave suffer added unemployment and earnings losses after *childbirth or illness* because they cannot return to their former jobs;" when they do return, "it is often at lower hourly wage rates." S. Rep. No. 103-3, at 16 (emphasis added). A second study estimated that "by the year after birth, the earnings of mothers were $1.40 an hour lower than those of women who did not give birth ([even though]

they had been higher before birth)." S. Rep. No. 102-68, at 24. Yet another study estimated that working women without employer-provided leave "had average annual earnings $5,000 lower than women with job-guaranteed leave." S. Rep. No. 103-3, at 13. Still more grave, "[t]he lack of job-guaranteed leave leads to even further losses in earnings," where "working women without leave lost $9,279 or 86 percent of their pre-birth earnings after childbirth" while "women with leave lost 51 percent of their pre-birth earnings." *Ibid.*

3. In adopting the FMLA's medical-leave provision, Congress also had before it nearly two decades of evidence regarding the patchwork of inadequate or unequal leave policies, which were premised on stereotypes that women were mothers first and workers second. *Cf. Hibbs*, 538 U.S. at 736 (noting "employers' stereotypical views about women's commitment to work and their value as employees"). In adopting the PDA, Congress identified policies "forc[ing] women who bec[a]me pregnant to stop working regardless of their ability to continue," "set[ting] arbitrary time limits" before which women could not return to work, and refusing "to credit women with accumulated seniority after a pregnancy disability leave on the same terms applicable to other persons absent from work for other disabilities." S. Rep. No. 95-331, at 6 (1977).

During the FMLA hearings, Congress heard testimony from many women who, despite the protections of the PDA, lost their jobs after becoming pregnant or after childbirth. *See Parental and Medical Leave Act of 1987: Hearing on S. 249, Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the S. Comm. on Labor and Human Res.*, 100th Cong., pt. 2 at 16 (1987) (woman who lost

job after childbirth). Professor Eleanor Holmes Norton testified that: "[women] risk losing their jobs when they are temporarily unable to work [due to] pregnancy and childbirth [because of the inadequacy of their employer's leave policy]." *Hearing on H.R. 925*, at 35.[12]

Although *Amici* do not believe it is necessary or appropriate for Congress to conduct a state-by-state analysis of medical-leave policies, (*see supra*, 12-13, and *Lane*, 541 U.S. at 524-29), in *Hibbs*, this Court already identified the deficiencies in each of the States' leave programs—deficiencies that implicated *all* of the FMLA's leave provisions, including medical leave. *See, e.g., Hibbs*, 538 U.S. at 729, 733-34, nn.6-9. The need to afford medical leave to both public and private employees to remedy gender discrimination in the workplace is thus ample to support Congress's use of its prophylactic authority afforded by Section 5 to remedy gender-based discrimination.

C. Subsection D Was A "Congruent And Proportional" Response To This Evidence.

At step three, the medical-leave provision was a "congruent and proportional" response to the preceding evidence of persistent gender discrimination in this arena.[13] As explained *supra*, 19, Subsection D of the Act shares all of the same limitations on scope that the Court found sufficient in the context of Subsection C to ensure that Congress

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[12] *See Hibbs*, 538 U.S. at 730 n.3 (explaining that Congress had sufficient evidence that deficiencies in private-employer leave plans were equally prevalent in public-employer plans).

[13] The court below did not reach step three, concluding instead that "[w]ithout such evidence, the self-care provision cannot pass the congruence-and-proportionality test." Pet. App. 12.

had not exceeded its prophylactic power. *See Hibbs*, 538 U.S. at 737-40.[14]

The language of the Act, and the legislative history that specifically addresses medical leave, confirms what *Hibbs* previously found to be true for Subsection C (and, as *Amici* respectfully submit in Part I, *supra*, to be true of all of the leave provisions). In enacting Subsection D as part of the FMLA, Congress was addressing years of gender discrimination in the workplace, which was manifest both in inadequate leave policies for pregnancy and illness, and in the disproportionate impact that such leave policies had on the ever-expanding category of women wage-earners, who were more likely to be single heads of households, and who were more likely to be deterred from starting families if they could not count on job protection before and after their child was born. This record is ample to uphold Congress's express intent to exercise its authority, under Section 5 of the Fourteenth Amendment, to abrogate state sovereign immunity from damages to remedy such gender discrimination.

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[14] As in *Hibbs*, Congress saw gender-neutrality as key to ensuring the remedy was congruent and effective. *Hibbs*, 538 U.S. at 737; H.R. Rep. No. 102-135, pt. 1, at 30.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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DANIEL COLEMAN,

Petitioner,

—v.—

MARYLAND COURT OF APPEALS, Frank Broccolina, State Court Administrator, Larry Jones, Contract Administrator,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") submits this brief, with the consent of the parties,[1] in support of Petitioner's argument that Congress properly exercised its powers under the Fourteenth Amendment when it enacted the self-care leave provision of the Family and Medical Leave Act ("FMLA"). Specifically, the Lawyers' Committee submits this brief to argue that Congress is entitled to substantial deference when Courts review legislation enacted under Section 5 of the Fourteenth Amendment that is intended to enforce a core Fourteenth Amendment right.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy to involve private attorneys in the effort to ensure the civil rights of all Americans. The Lawyers' Committee has been involved as amicus curiae or counsel in several cases before the Court involving the scope of Congress' legislative power. *See, e.g., Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Medical Bd. of California v. Hason*, 537 U.S. 1028 (2002), cert. dismissed, 538 U.S. 958 (2003); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999). In addition, the Lawyers' Committee frequently advocates in sup-

[1] Counsel for the Lawyers' Committee authored this brief in its entirety. No person or entity other than the Lawyers' Committee, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief.

port of the prevention of gender discrimination. Consequently, the Lawyers' Committee has an interest in advancing Congress' power to enact legislation to protect the Fourteenth Amendment's safeguards.

SUMMARY OF ARGUMENT

The power granted to Congress under Section 5 of the Fourteenth Amendment permits Congress to enforce the rights guaranteed therein through the enactment of "appropriate legislation." U.S. CONST. amend. XIV, § 5. Congress' power to ensure the Fourteenth Amendment's constitutional guarantees through Section 5 is a "broad power indeed." *Lane*, 541 U.S. at 519. But this enforcement power is limited, as Congress may not create rights or change the nature of existing rights. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). As a result, the Court has set forth a three-step inquiry for the Court to follow when determining if Congress has properly exercised its Section 5 powers. First, the Court must identify the right at issue. Second, the Court must examine whether Congress has identified a history of unconstitutional conduct by the States that justifies its remedial measure. Third, the Court must decide whether the challenged legislation is congruent and proportional to the targeted violation. Importantly, the Court defers to Congress when it exercises its Section 5 powers to protect a right subject to heightened scrutiny. Indeed, both of the Court's recent decisions that considered legislation enacted to protect rights subject to heightened scrutiny upheld such legislation. *See Tennessee v. Lane*, 541 U.S. 509 (2004) (holding

that Congress' enactment of Title II of the Americans with Disabilities Act was a valid exercise of Congress' Section 5 powers); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (finding that Congress properly exercised its Section 5 powers in enacting the family-care leave provision of the Family and Medical Leave Act).

By enacting the self-care provision of the Family and Medical Leave Act based on the evidence of discrimination before it, Congress sought to enforce the right to be free from gender discrimination, a right subject to heightened scrutiny. Consequently, the Court should defer to Congress' decision to enact that legislation, and find that the self-care provision of the Family and Medical Leave Act is a valid application of Congress' Fourteenth Amendment enforcement powers. Indeed, because Congress' intent to abrogate the States' sovereign immunity is clear and because Congress has properly sought to enforce the right to be free of gender discrimination, the Lawyers' Committee respectfully urges the Court to uphold Congress' use of its Section 5 powers and reverse the decision below.

ARGUMENT

The question before the Court is whether Congress acted appropriately pursuant to its Fourteenth Amendment enforcement authority to prevent gender discrimination by abrogating states' sovereign immunity when it enacted 29 U.S.C. § 2612(a)(1)(D), the "self-care provision" of the Family and Medical Leave Act ("FMLA"). The Lawyers' Committee respectfully requests that the Court confirm that the application of the three-

part standard of review set forth in *City of Boerne v. Flores*, 521 U.S. 507 (1997), requires substantial deference to Congress' actions pursuant to Section 5 of the Fourteenth Amendment where Congress seeks to protect a right subject to heightened scrutiny review, and as a result, Congress appropriately exercised its Fourteenth Amendment powers in this case.

I. THE CIVIL WAR AMENDMENTS GRANT CONGRESS THE POWER TO ENFORCE THOSE AMENDMENTS IN ORDER TO PROTECT THE RIGHTS GUARANTEED UNDER THOSE AMENDMENTS.

In the five years following the Civil War, the United States amended the Constitution by adding the Thirteenth, Fourteenth, and Fifteenth Amendments. These Amendments (collectively, the "Civil War Amendments") changed the Constitutional landscape through the provision of new, far-reaching rights: the Thirteenth Amendment abolished slavery, the Fourteenth, *inter alia*, guaranteed broader citizenship rights and provided for equal protection and due process, and the Fifteenth prohibited voting discrimination on the basis of race. U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1; and U.S. CONST. amend. XV, § 1. Together, the Civil War Amendments were directed at ending racial discrimination and preventing States from encroaching on the rights guaranteed therein. *See Oregon v. Mitchell*, 400 U.S. 112, 127 (1970). The Civil War Amendments were indisputably targeted at the States. For example, the Fourteenth Amendment limited the States' abilities to "make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Similarly, the Fifteenth Amendment provided that the rights of citizens to vote "shall not be denied or abridged . . . ***by any State*** on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1 (emphasis added).

To ensure that the federal government would have the authority to effectuate the Civil War Amendments, the Amendments contain explicit language providing that Congress shall have power to enforce these articles by "appropriate legislation," a positive grant of power to Congress absent in any of the previous Constitutional amendments. *See* U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; and U.S. CONST. amend. XV, § 2. This language gives Congress the "full remedial powers" necessary to make the protections offered by the Civil War Amendments "fully effective" through the passage of legislation. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (quoting *Ex parte Com. of Virginia*, 100 U.S. 339, 345 (1879).).

The Supreme Court has made clear that when Congress appropriately exercises its Fourteenth Amendment enforcement powers to limit state authority, Congress is not infringing upon state sovereignty:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are, to a degree, restrictions of State power.

> It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.

Fitzpatrick v. Bitzer, 427 U.S. 445, 454 (1976) (quoting *Ex parte Com. of Virginia*, 100 U.S. at 345); *see also Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999) (the Civil War Amendments "by their nature contemplate some intrusion into areas traditionally reserved to the States"). In fact, Section 5 was included in the Fourteenth Amendment to grant Congress the broad powers expressed in the Necessary and Proper Clause. *See Katzenbach v. Morgan*, 384 U.S. 641, 650 n. 9, (1966) (further explaining that earlier drafts of the Fourteenth Amendment employed "necessary and proper" terminology to describe the scope of Congressional power under the Amendment).

Consistent with Congress' ability to protect against state intrusion on the rights protected by the Civil War Amendments, this Court has long held that state sovereign immunity can be validly abrogated by Congress under the "appropriate legislation" provision of Section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. at 456 ("Congress may, in determining what is 'appropriate legislation' for the purposes of enforcing the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.").

Congress may do so when it both "unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (internal quotation and citation omitted). Indeed, "the Eleventh Amendment, and the principle of state sovereignty which it embodies. . . , are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick* 427 U.S. at 456 (citation omitted).

Nor is Congress limited to abrogating the Eleventh Amendment only when it seeks to make activity prohibited by the Fourteenth Amendment illegal. As the Court has repeatedly reasoned, Congress has the authority both to remedy and to deter violation of rights guaranteed under the Fourteenth Amendment by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (reviewing the extent of Congress' powers under Section 5 of the Fourteenth Amendment); *see also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (same); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (same); *Katzenback v. Morgan*, 384 U.S. at 658, (same). Thus, by enacting "appropriate legislation," Congress may protect the substantive guarantees of the Fourteenth Amendment and enact forward-looking legislation to prevent violations of the rights guaranteed by the Fourteenth Amendment. *See Boerne*, 521 U.S. at 518 (affirming Congress' Section 5 powers).

II. THE COURT MUST EXAMINE THE RIGHT AT ISSUE, THE HISTORY OF STATE UNCONSTITUTIONAL CONDUCT, AND DECIDE IF THE CONGRESSIONAL LEGISLATION IS CONGRUENT AND PROPORTIONAL.

It is well-established that Congressional power under Section 5 of the Fourteenth Amendment is broad in scope:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Com. of Virginia, 100 U.S. 339, 345-46 (1879). In fact, because Section 5 is a "positive grant" of legislative power to Congress "[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment [such that] its conclusions are entitled to much deference." *Boerne*, 521 U.S. at 517, 536, (citing *Katzenback v. Morgan*, 384 U.S. at 651) (internal quotation marks omitted); *see also Tennessee v. Lane*, 541 U.S. 509, 518-20 (2004) ("This enforcement power, as we have often acknowledged, is a broad power indeed. . . When Congress seeks to remedy or prevent unconstitutional discrimination, Section 5 authorizes it to enact prophylactic

legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.") (internal citation and quotation omitted).

But there are limits to that enforcement power. When a Congressional act redefines the Constitution, as opposed to enforcing it, Congress has overstepped its bounds: "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Boerne*, 521 U.S. at 519. The Supreme Court has given Congress "wide latitude" in determining "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Id.* at 519-20.

In reviewing whether Congress has exceeded its wide latitude in drawing the line between enforcement and substantive redefinition, the Court's *Boerne* decision and its progeny have set forth a three-step inquiry: (1) the Court must identify the right at issue, (2) examine whether Congress has identified a history of unconstitutional conduct by the States that justifies the remedial measure, and (3) finally decide whether or not the challenged legislation is congruent and proportional to the targeted violation. *See Boerne*, 521 U.S. 507; *see also Lane*, 541 U.S. at 522-530; *Garrett* 531 U.S. at 365-374.

As compared to the Thirteenth (abolition of slavery) and Fifteenth Amendments (elimination of racial discrimination in voting), both of which involve narrowly defined rights, the Fourteenth

Amendment protection of equal protection and due process is more general in nature. The Court, in its Fourteenth Amendment jurisprudence, has recognized that a handful of core Fourteenth Amendment rights such as the right to be free from racial and gender discrimination and the right of access to the courts, are entitled to heightened protection from discriminatory state action. In contrast, the Court has been deferential to state actors—applying a rational basis test—regarding a host of other alleged rights that the Court has found are not subject to heightened scrutiny.

The Court has applied this distinction between core Fourteenth Amendment rights and other rights in the *Boerne* line of cases: the Court has shown substantial deference to Congress when Congress is enforcing a core Fourteenth Amendment right and little deference when it has not. The distinction is entirely logical because Congress is more likely to be appropriately exercising its Fourteenth Amendment authority when it is protecting a core Fourteenth Amendment right, and more likely to be redefining the Fourteenth Amendment when it is not.

A. Deference to Congress is Appropriate Where the Right At Issue Is Subject to Heightened Scrutiny Review.

The Court was clear in *Boerne* that "[t]he appropriateness of remedial measures must be considered in light of the evil presented." 521 U.S. at 530. Consequently, the first step the Court takes when reviewing Congress' enactment of remedial, prophylactic legislation requires the Court to "identify the constitutional right or rights that

Congress sought to enforce" when it enacted the challenged legislation. *Lane*, 541 U.S. at 522; *see also Garrett*, 531 U.S. at 365 (explaining that the court must "identify with some precision the scope of the constitutional right at issue"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 652 (1999) (noting that "the first step of the inquiry . . . is to determine what injury Congress sought to prevent or remedy with the relevant legislation"). In fact, in both of the post-*Boerne* cases to consider a right subject to heightened scrutiny, the Court deferred to Congress' findings and upheld the law in question.[2] *See Hibbs*, 538 U.S. 721 (upholding the family care provision of the FMLA as a measure to prevent gender discrimination in the workplace); *Lane*, 541 U.S. 509 (upholding the right of access to the courts requirement under Title II of the Americans with Disabilities Act).[3]

[2] Even prior to *Boerne*, the Court consistently upheld legislation intended to protect a right subject to heightened scrutiny review. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment as a measure to combat racial discrimination in voting); *Katzenbach v. Morgan*, 384 U.S. 641, 643-47 (1966) (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970) (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *City of Rome v. U.S.*, 446 U.S. 156, 161 (1980) (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a "standard, practice, or procedure with respect to voting.").

[3] The *Lane* court explained that the Court has upheld Title II as it applies to the fundamental right of access to the

In *Hibbs*, the Court upheld the constitutionality of the family-care provision of the FMLA. The Court recognized that in enacting the FMLA, Congress was attempting to prevent gender discrimination, thereby triggering a heightened level of scrutiny. *See Hibbs*, 538 U.S. at 736.[4] The Court reached a similar conclusion in *Tennessee v. Lane* when it upheld Title II of the Americans with Disabilities Act. There, the Court considered whether or not Title II of the Americans with Disabilities Act was a proper exercise of Congress' Section 5 power. The *Lane* Court observed that Title II "is aimed at the enforcement of a variety of basic rights . . . that call for a standard of judicial review at least as searching, and in some cases

courts, which has been recognized, as set forth below, as calling for a "standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications" which call for a heightened level of scrutiny. *See Lane*, 541 U.S. at 529.

[4] States may not use gender-based classifications unless the classification both "serves important governmental objectives" and is "substantially related to the achievement of those objectives." *Hibbs*, 538 U.S. at 736 (internal quotation and citation omitted). Requiring a heightened level of review for gender-based classifications prohibits States from employing gender "as an inaccurate proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976). Significantly, prior to the recognition that the right to be free from gender discrimination is subject to a heightened level of review, States were able to use "archaic and overbroad generalizations," such as the stereotype that women belonged in the home, to justify legislation. *Id.* Now, and as a result of heightened scrutiny review, a proponent of gender discrimination must establish an "exceedingly persuasive justification" for sex-based classification to be valid. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

more searching, than the standard that applies to sex-based classifications." *Lane*, 541 U.S. at 529. Indeed, the Court placed emphasis on the nature of the right that Congress sought to protect, ultimately finding it "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." *Id; see also South Carolina v. Katzenbach*, 383 U.S. at 308-313 (upholding the Voting Rights Act of 1965 and deferring to Congress because racial classifications are presumptively invalid).

Notably, where the Court has struck down Section 5 legislation post-*Boerne*, the legislation at issue did not seek to protect rights subject to heightened scrutiny. For instance, in *Garrett* and *Kimel*, the Court reviewed legislation targeted toward age- and disability-based discrimination, both of which are only subject to rational basis review. *See Garrett*, 531 U.S. at 366-67; *Kimel*, 528 U.S. at 86; *see also Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (striking down legislation intended to protect against patent infringements). Classifications protected only by rational basis review are permissible "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation omitted). While never suggesting that Congress is not entitled to deference when it enacts legislation pursuant to Section 5 of the Fourteenth Amendment, the Court explained that where a right is only subject to rational basis review, a States' legislation concerning that right need only be justified by a

rational explanation, forcing changes to such statutes to "come from positive law and not through the Equal Protection Clause." *Garrett*, 531 U.S. at 368.

In sum, the Court has made clear that when Congress seeks to protect a right subject to heightened scrutiny, and consequently enacts legislation pursuant to Section 5 of the Fourteenth Amendment, it is entitled to substantial deference from the Court under step one of the Court's three-part test.

B. When The Protected Right Is A Core Fourteenth Amendment Right, It Is Easier To Show A Pattern Of Unconstitutional Conduct By The States.

Second, the Court must "examine whether Congress identified a history and pattern of unconstitutional [conduct] by the States" that justified the enactment of the remedial measure. *Garrett*, 531 U.S. at 368. Legislation that "pervasively prohibits *constitutional* state action in an effort to remedy or to prevent *unconstitutional* state action," and which does not seek to protect a right subject to heightened scrutiny, will not survive the Court's review if there is no pattern or history of the States acting unconstitutionally. *See Boerne*, 521 U.S. at 532-33 (striking down the Religious Freedom and Restoration Act due in part to the absence of any documented instances of State constitutional violations) (emphasis added); *see also Fla. Prepaid*, 527 U.S. at 640 (striking down the Patent and Plant Variety Protection Remedy Clarification Act because Congress failed to identify any "pattern of patent

infringement by the States, let alone a pattern of constitutional violations" that justified the Act's broad coverage); *Kimel*, 528 U.S. at 89 (striking down the Age Discrimination in Employment Act and holding that Congress failed to identify "any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."). Indeed, if the right at issue is not subject to heightened scrutiny, the Court will strike down legislation where the record falls "far short of even suggesting the pattern of unconstitutional discrimination on which Section 5 legislation must be based." *Garrett*, 531 U.S. at 370.

Where, however, the Court has already found under step one of its three-part test that Congress' legislation seeks to protect a right subject to heightened scrutiny, the Court has not been as demanding on Congress in determining whether there is a history and pattern of unconstitutional conduct by the States. In *Hibbs*, the Court stated that "[b]ecause the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations." *Hibbs*, 538 U.S. at 736. In *Lane*, the Court explained that Congress' enactment of the family-leave provision of the FMLA was upheld in *Hibbs* "as a valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional. . . ." *Lane*, 541 U.S. at 519. Similarly, in *Lane*, the Court

upheld Title II of the ADA because it sought to protect the fundamental right of access to the courts with persons with disabilities where the evidence relating to that specific issue consisted of a report from the United States Commission on Civil Rights, a report from a Congressionally appointed task force, and anecdotal evidence provided at a Congressional hearing. *Lane*, 541 U.S. at 527. These determinations in *Hibbs* and *Lane* are consistent with the well-established principle that "[i]n identifying past evils, Congress obviously may avail itself of information from any probative source," *Katzenbach*, 383 U.S. at 330, including "statistical, legislative, and anecdotal evidence," *Lane*, 541 U.S. at 529, as well as evidence of discriminatory effects. Put simply, when Congress legislates to protect rights subject to heightened scrutiny review, the Court has been deferential in evaluating whether Congress has established a pattern of unconstitutional conduct.

C. Legislation Is Congruent and Proportional Where There Is A Need To Protect Rights Subject To Heightened Scrutiny Review.

Once the Court has determined the right at issue and examined the pattern and history of constitutional violations, the court concludes its inquiry by deciding whether the challenged legislation constitutes "an appropriate response" to the identified "history and pattern" of unconstitutional conduct and resolving whether or not the legislation is "congruent and proportional to the targeted violation." *Lane*, 541 U.S. at 530; *see also Garrett*, 531 U.S. at 374; *Hibbs*, 538 U.S. at 737. Put another way, when Congress adopts legisla-

tion to enforce rights guaranteed by the Fourteenth Amendment, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted [by Congress] to that end." *Boerne*, 521 U.S. at 520.

The Supreme Court applied the congruence and proportionality test for the first time in *City of Boerne*. In *Boerne*, Congress made clear its intention to legislatively overrule a constitutional interpretation of the Supreme Court and the Court found that Congress exceeded its powers. In *Employment Div., Department of Human Resources v. Smith*, 494 U.S. 872 (1990), a divided Supreme Court had held that the Free Exercise Clause did not protect members of a Native American church who lost their jobs and denied unemployment benefits because they had used peyote. Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) as a "direct response" to the *Smith* decision, and in its findings, stated that the *Smith* decision changed the standard for interpreting the Free Exercise Clause and that Congress was restoring the pre-Smith standard. *Boerne*, 521 U.S. at 515. The Supreme Court found that in enacting RFRA, Congress was essentially trying to usurp the role of the Court as constitutional interpreter:

> Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces

> the duty to say what the law is. *Marbury* v. *Madison*, 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Id. at 535-36; *Lane*, 541 U.S. at 520 (describing that Congress' "very purpose" in enacting RFRA was to work a substantive change in the Constitution).

Boerne emphasized, however, that Congress may act within its powers when it enacts remedial legislation under Section 5 to prevent "the mischief and wrong which the Fourteenth Amendment was intended to provide against." *Boerne*, 521 U.S. at 532 (internal quotation and citation omitted). Nowhere is Congress' power to legislate stronger than when it legislates to protect rights that are subject to heightened scrutiny review. Congress may, for instance, use Section 5 to enact "strong remedial and preventative measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *See id.* at 526.

Consequently, it is not surprising that the two statutes the Court has upheld under the congruence and proportionality test both sought to protect a class or right that, like racial classifications, is subject to heightened judicial scrutiny. *See Hibbs*, 538 U.S. at 724 (suspect gender classifications); *Lane*, 541 U.S. at 533-34 (fundamental right of access to the courts). In fact, since *Boerne*, the only statutes that the Court has found to be disproportionate to the harms they sought to redress were statutes that sought to protect rights subject only to rational basis review. *See, e.g.*, *Garrett*, 531 U.S. at 367 (holding that the Fourteenth Amendment itself does not require "special accommodations for the disabled, so long as [States'] actions towards such individuals are rational"); *Kimel*, 528 U.S. at 83-84 (holding that the Fourteenth Amendment allows the States to discriminate on the basis of age where the age classification is rational). Thus, the Court has deferred to Congress' decision to legislate in order to protect rights subject to heightened scrutiny review, and has found that the legislation was "congruent and proportional" to the harm it sought to redress.

III. CONGRESS PROPERLY EMPLOYED ITS POWER UNDER THE FOURTEENTH AMENDMENT WHEN IT ENACTED THE SELF-CARE PROVISION OF THE FMLA IN ORDER TO PROTECT AGAINST GENDER DISCRIMINATION.

As set forth above, Congress may enforce rights protected by the Fourteenth Amendment and in so doing, may abrogate the States' Eleventh Amendment immunity. To accomplish this, Congress must (1) make its intention to abrogate unmistakably clear in the language of the statute, and (2) act pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. *See Hibbs*, 538 U.S. at 726. The Court has already held that Congress' intent to abrogate the States' Eleventh Amendment immunity in enacting the FMLA is "not fairly debatable" because the FMLA enables employees to seek damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." *Id.* (quoting 29 U.S.C. § 2617(a)(2)).[5] The ability of employees to seek damages also applies to the Act's self-care provision. *See* 29 U.S.C. § 2617(a)(2). The only question before the Court, therefore, is whether Congress acted appropriately pursuant to its Fourteenth Amendment powers when it passed the self-care leave provision of the FMLA.

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.* provides employees up to

[5] The Court previously held that the use of identical language in the Age Discrimination in Employment Act of 1967 ("ADEA") satisfied the clear statement requirement. *See Kimel v. Fl. Bd. of Regents*, 528 U.S. 62, 73-78 (2000).

twelve weeks of unpaid leave for medical reasons or other qualifying exigencies. 29 U.S.C. § 2612(a)(1). In enacting the FMLA, Congress sought to minimize "the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender-neutral basis[,] and to promote the goal of equal employment opportunity for women and men. . . ." 29 U.S.C. §§ 2601(b)(4) and (5). As the Court recognized in *Hibbs*, "[t]he FMLA aims to protect the right to be free from gender based discrimination in the workplace." 538 U.S. at 728. To that end, the family-leave provision of the FMLA at issue in *Hibbs* sought to eliminate gender discrimination by providing that both men and women were entitled to take a leave of absence for qualifying family reasons, as defined in the Act. *See* 29 U.S.C. 2612(a)(1)(C) (referring to care of a gender-neutral "spouse.") By requiring family leave for both genders, the Court protected women (who are traditionally more likely to take family leave than men) from discrimination, while preventing a situation where employers would simply eliminate family leave entirely. *See Hibbs*, 538 U.S. at 728-35.

Applying the three-part standard of review to the family-care leave provision of the FMLA, the Court has already concluded that the family-care leave provision is a valid exercise of Congress' Section 5 powers. *Hibbs*, 538 U.S. at 737 ("Congress' chosen remedy, the family-care leave provision of the FMLA, is congruent and proportional to the targeted violation."). In so doing, the Court was deferential to Congress' decision to enact legislation pursuant to Section 5 of the

Fourteenth Amendment, particularly in light of the fact that "the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test." *Id.* at 736. Ultimately, *Hibbs* recognized that in enacting the family-care provision of the FMLA, Congress sought to protect against gender discrimination by creating "an across-the-board, routine employment benefit for all eligible employees," thereby ensuring "that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men." *Id.* at 737.

The right to be free from gender discrimination, a right unquestionably subject to heightened scrutiny review, is likewise at issue here. *See Craig*, 429 U.S. at 197. The FMLA's self-care provision seeks to prevent the very same problem that the FMLA's family leave provision sought to prevent: gender discrimination by employers against women, including women who are forced to avail themselves of self-care leave due to pregnancy and recovery from childbirth. Prior legislation, including the Pregnancy Discrimination Act ("PDA"), did not guarantee job-protected leave during pregnancy. The PDA mandated that pregnancy was to be treated the same as all other temporary disabilities. Thus, if an employer did not provide any temporary disability leave the employer was not required to provide pregnancy leave. Therefore, before the passage of the FMLA, a pregnant woman who needed to take pregnancy-related leave was not guaranteed that her job would still be there upon her return. One solution

might have been to provide in the FMLA for pregnancy-specific leave, but as the legislative record clearly demonstrates, Congress was concerned that creating a leave requirement that covered pregnancy only, and not other forms of self-care, would create an incentive for employers to discriminate against women, particularly women who were pregnant or of child-bearing age. *See, e.g.*, S. Rep. No. 102-68, at 35 (1991) ("Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability."). Instead, by allowing self-care leave for both men and women, the FMLA reduces the incentive—at the hiring stage—to discriminate against women who may one day need to take leave during pregnancy.[6] Thus, the FMLA's self-care provision prevents the gender discrimination that would result if the law only allowed women to take self-care recovery for pregnancy and childbirth.[7]

[6] Similarly, in the passage of the PDA, Congress chose to treat pregnancy the same as all other temporary disabilities rather than provide specifically for pregnancy leave. *See* Rep. No. 95-331, p. 4 (1977); Legislative History of the Pregnancy Discrimination Act of 1978, p. 41 (1980) (Committee Print prepared for the Senate Committee on Labor and Human Resources).

[7] The *amicus* brief submitted by the National Partnership for Women & Families further articulates the evidence necessitating Congress' enactment of the self-care provision of the FMLA in order to prevent gender discrimination. The Lawyers' Committee supports and endorses the position taken by the National Partnership for Women & Families and their fellow *amici*.

In light of the right at issue, the application of the *Boerne* three-part test yields the inevitable conclusion that Congress properly abrogated the States' sovereign immunity when it passed the self-care provision of the FMLA. First, it is clear that the right at issue, the right to be free from gender discrimination, is subject to heightened scrutiny. *See Craig*, 429 U.S. at 197. Congress' decision to enact the self-care provision of the FMLA is therefore entitled to deference from the Court. *See, e.g., Hibbs*, 538 U.S. 721 (deferring to Congress where Congress sought to protect against gender discrimination); *Lane*, 541 U.S. 509 (deferring to Congress where Congress sought to ensure the fundamental right of access to the courts). Second, because Congress enacted this provision to protect against gender discrimination, it is easier for Congress to demonstrate a history and pattern of State constitutional violations. *See, e.g., Hibbs*, 538 U.S. at 736. Here, the legislative record contains ample examples of employers discriminating against pregnant women. *See, e.g.*, 100 Cong. 16, 19 (1987) (testimony regarding how women lost their jobs after becoming pregnant or after childbirth despite the passage of the PDA). Third, there can be no doubt that the self-care provision of the FMLA is an "appropriate response" to unconstitutional gender discrimination, and is congruent and proportional to the targeted violation: where Congress legislates to protect a right subject to heightened scrutiny, the Court should defer to Congress' decision to use its Section 5 powers to enforce the guarantees of the Fourteenth Amendment. *See, e.g., Lane*, 541 U.S. at 530-31.

The Lawyers' Committee thus respectfully submits that the Court should defer to Congress' decision to pass the self-care provision of the FMLA through its powers under Section 5 of the Fourteenth Amendment, and hold that, in light of the heightened scrutiny implicated by the right at issue, Congress properly abrogated the States' Eleventh Amendment sovereign immunity.

CONCLUSION

For all the foregoing reasons, the Lawyers' Committee respectfully requests that the Court reverse the judgment of the Fourth Circuit, and hold that Congress validly exercised its Fourteenth Amendment powers when it enacted the self-care provision of the Family and Medical Leave Act.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

No. 10-1016

IN THE

Supreme Court of the United States

DANIEL COLEMAN,
Petitioner,

v.

MARYLAND COURT OF APPEALS *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AARP, AFSCME INTERNATIONAL, AMERICAN CIVIL LIBERTIES UNION, A BETTER BALANCE, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL SENIOR CITIZENS LAW CENTER, NATIONAL WOMEN'S LAW CENTER, 9TO5, NATIONAL ASSOCIATION OF WORKING WOMEN, AND SERVICE EMPLOYEES INTERNATIONAL UNION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties,[1] in support of Petitioner's argument that the Family and Medical Leave Act, including the Act's self-care provision, validly abrogated state sovereign immunity. Specifically, the *amici* submit this brief to highlight the legislative intent of the self-care provision to address sex discrimination against women.

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care for all, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has been instrumental in many of the major legal changes that have improved the lives of working women, including advancements in sexual harassment law and the passage of the Pregnancy Discrimination Act. In 1985, the Women's Legal Defense Fund drafted the original Family and Medical Leave Act. For the next eight years, the Women's Legal Defense Fund led the coalition working for the passage of this legislation, which finally occurred in 1993.

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

Since the passage of the Family and Medical Leave Act (FMLA), the National Partnership has worked to defend the law and to ensure its full and intended application. In 2003, the National Partnership served as counsel to William Hibbs in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), in which the Supreme Court determined that the FMLA abrogated state sovereign immunity with regard to the family leave provision of the FMLA. The National Partnership remains a leader in the efforts to preserve FMLA leave.

AARP is a non-partisan, non-profit organization dedicated to addressing the needs and interests of people age 50+. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Approximately half of AARP's members are in the workforce and many more are seeking employment. Thus, they are protected by various federal employment laws, including the Family and Medical Leave Act of 1993, as amended (FMLA). AARP's working members benefit from the right to take unpaid FMLA leave and the security that comes with knowing such an option is available. AARP's members not in the workforce benefit from FMLA provisions assuring the rights of working children, spouses and other relatives, including members of the military, to take unpaid leave in order to care for their parents, spouses and other relatives with serious medical conditions. AARP played a significant role in securing enactment of the FMLA, and has continued to work to assure its vigorous and effective enforcement, including through *amicus curiae* briefs in important cases.

AFSCME International is an unincorporated labor union with more than 1.6 million active and retired members working in the public sector, child care, and health care. Many AFSCME employees work directly for state employers or subdivisions of states. AFSCME International is headquartered in Washington, D.C. and has approximately 3,400 local unions and fifty-nine council affiliates around the country. The majority of AFSCME members are women who work as secretaries, librarians, cafeteria workers, caseworkers, lab technicians, researchers, RNs and LPNs, bus drivers, heavy equipment operators, correctional officers, child care workers, home care workers and many more important state jobs. AFSCME has filed briefs as *amicus curiae* before state and federal courts in numerous cases in which the interests of its affiliates and/or working people are implicated. The matter of protecting workers who need time away from their jobs to recover from serious health conditions presents an important issue of health policy, labor policy and fundamental principles of equality and human rights. These issues impact the day to day lives of AFSCME's members and their families. AFSCME supports the policies of the Family Medical Leave Act and strongly supports full coverage under the law for state workers needing self-care leave.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Maryland is one of its state affiliates, with approximately 14,000 members statewide. The ACLU, through its Women's Rights Project, frequently litigates cases concerning sex discrimination

in the workplace, and has appeared before this Court in numerous cases involving women's equality, both as direct counsel and as amicus curiae. The ACLU and the ACLU of Maryland have participated in litigation concerning the proper interpretation of the Family and Medical Leave Act.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through legislative advocacy, litigation, research, public education and technical assistance to state and local campaigns, A Better Balance is committed to helping workers care for their families without risking their economic security. A Better Balance has been actively involved in working for better leave policies, particularly paid sick leave and paid family leave throughout the country. The organization also runs a clinic in which the importance of the FMLA for workers with family care responsibilities and self-care needs can be seen first hand.

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally treated in the workplace. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed dozens of *amicus curiae* briefs before the U.S. Supreme Court and federal appellate courts

to ensure that the goals of workplace statutes, including the Family and Medical Leave Act, are fully realized.

The National Senior Citizens Law Center (NSCLC) is a non-profit organization whose principal mission is to protect the rights of low income older adults. For more than 35 years, NSCLC has sought to ensure the health and economic security of older persons with limited income and resources, through advocacy, litigation, and the education and counseling of local advocates. NSCLC's *Federal Rights Project* works to ensure that people retain the right to enforce basic guarantees to health care, economic security and civil rights.

The National Women's Law Center is a nonprofit legal advocacy organization dedicated since 1972 to the advance and protection of women's legal rights and the corresponding elimination of sex discrimination from all facets of American life. Enactment and enforcement of effective family and medical leave laws and policies is central to NWLC's goal of securing equal opportunity for women in the workplace, and NWLC has been a strong supporter of the Family and Medical Leave Act since its conception. NWLC has prepared or participated in numerous *amicus* briefs filed with the Supreme Court and the courts of appeals in employment cases.

9to5, National Association of Working Women is a national membership-based organization of low-wage women working to achieve economic justice and end discrimination. Founded in 1973, 9to5 is one of the organizations that worked to pass the Family and Medical Leave Act. 9to5's members and constituents are directly affected by FMLA, by the lack of access to job-protected workplace leave, and by sex discrimi-

nation including pregnancy discrimination. The organization's toll-free Job Survival Helpline fields thousands of phone calls annually from women facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to end workplace discrimination and its work to promote policies that aid women in their efforts to achieve economic security. The outcome of this case will directly affect 9to5 members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

The Service Employees International Union (SEIU) is an organization of 2.2 million members. SEIU is the nation's second-largest public services union, with more than one million local and state government workers, public school employees, and child care providers among its members. The majority of SEIU members are women. SEIU is committed to the preservation and expansion of the FMLA because it helps secure the dignity and worth of all American workers, including SEIU and their families.

SUMMARY OF ARGUMENT

Congress validly abrogated state sovereign immunity for Family and Medical Leave Act (FMLA) claims, and in particular claims for self-care leave, in response to unconstitutional sex discrimination. The self-care provision was intended to offer protection against sex discrimination by providing job-protected leave for women to recover from pregnancy and childbirth. The FMLA offered self-care leave on a gender-neutral basis to avoid the creation of special protections for women that could incentivize further, *ex ante* sex discrimination in employment. Protecting the leave rights of women only would have had the

perverse effect of fostering discrimination against the hiring of women because of their protected right to leave. By providing for self-care leave on a gender-neutral basis, Congress sought to counteract discrimination by employers who might otherwise refuse to hire women because of their presumed greater need for leave.

The plain language of the FMLA establishes that Congress sought to offer the protections of the FMLA to state employees. Chief Justice Rehnquist's decision in *Nevada Dep't of Human Resources v. Hibbs* concluded that Congress validly abrogated state sovereign immunity with respect to the FMLA's family-care provision. Under the analysis set out in *Hibbs*, the self-care provision also validly abrogated state sovereign immunity by offering a congruent and proportional response to unconstitutional sex discrimination.

The self-care provision offers critical rights to leave for millions of state employees. The job protections established by the FMLA enable workers to retain their jobs as they recover from serious medical conditions, including pregnancy-related disability and childbirth, so that they can continue to provide for themselves and their families. Consistent with the legislative intent and with established constitutional analysis, state employees should be entitled to the full range of remedies Congress provided for violations of the rights set out under the plain language of the FMLA.

ARGUMENT

In this case, the Court is being asked to determine whether Congress validly abrogated state sovereign immunity for state workers' claims for damages for

violations of their rights to FMLA leave to care for their own serious health conditions. *Amici* respectfully request that the Court determine that Congress validly abrogated state immunity under the self-care provision of the FMLA as a congruent and proportional response to unconstitutional sex discrimination.

The FMLA guarantees eligible employees twelve weeks of unpaid leave each year to recover from their own serious health conditions, including pregnancy, or to care for a newborn, newly adopted child, or seriously ill family member, while ensuring job security. 29 U.S.C. § 2612(a)(1)(A-D). In 2008, the FMLA was amended to include additional leave and reasons for leave for military families. *Id.* at § 2612(a)(1)(E) & (a)(3). The plain language of the statute extended the FMLA's protection to state employees. *See* 29 U.S.C. § 2611(4)(B) (including "public agency" within the definition of "employer" under the FMLA). Congress expressly stated in the statute that one purpose of the FMLA was to provide medical leave "in a manner that, consistent with the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) . . . on a gender-neutral basis." 29 U.S.C. § 2601(b)(4). Congress recognized, with particular relevance to the self-care provision, that "A law providing special protection to women . . . , in addition to being inequitable, runs the risk of causing discriminatory treatment." *See, e.g.*, H.R. Rep. No. 103-8, pt. 1, at 41 (1993).

I. A Primary Purpose of the FMLA's Self-Care Provision Was to Eliminate Unconstitutional Sex Discrimination, Including Discrimination by the States.

The FMLA's self-care provision was intended to offer protection against sex discrimination in two interrelated ways. First, the self-care provision sought to combat the documented problem of discrimination against women of child-bearing age by offering job-protected leave for pregnancy and childbirth, among other "serious medical condition[s]." Indeed, the very genesis of the Family and Medical Leave Act was to address the discrimination that women faced related to their unique need for disability leave while recovering from pregnancy and childbirth. Second, to counteract any tendency by employers to discriminate against women because of any presumed greater need for leave, Congress provided self-care leave on a gender-neutral basis. Protecting the leave rights of women only, as many state laws did at the time,[2] would have had the perverse effect of fostering discrimination in hiring women. The extensive legislative record makes clear congressional intent to combat sex discrimination with the self-care provision. Indeed, the Court has recognized that "legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Orr v. Orr*, 440 U.S. 268, 283 (1979); *see also, Nashville*

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[2] As of 1993, nine states and Puerto Rico offered leave to female employees only, restricting such leave to pregnancy, disabilities related to pregnancy, and maternity leave. *See* Women's Bureau, U.S. Dep't of Labor, State Maternity/Family Leave Law (1993).

Gas Co. v. Satty, 434 U.S. 136, 142 (1977) (employers are not permitted "to burden female employees in such a way as to deprive them of employment opportunities because of their different role"). Accordingly, the FMLA offered self-care leave on a gender-neutral basis to protect the jobs of women during childbirth and any associated physical disability, while avoiding the creation of special protections for women that would incentivize further discrimination.

This Nation has a lengthy and regrettable history of unconstitutional state-sponsored discrimination on the basis of sex. Congress enacted the Family and Medical Leave Act in 1993 on a record replete with such evidence of historical and ongoing sex discrimination against women of childbearing age. For generations, state laws and state action excluded women from many forms of employment, and women were often subjected to discriminatory terms, conditions, and benefits in many of the jobs they were allowed to hold.[3] A number of states had enacted

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[3] *See, e.g.*, 1927 N.Y.Laws, c. 453; 1930 N.Y.Laws, c. 868; Act of July 25, 1913; Act No. 466, Pa.Laws 1913 (prohibiting women from working between the hours of 10 p.m. and 6 a.m.); *see also*; *United States v. Virginia*, 518 U.S. 515 (1996) (Virginia state university refused to admit women); *Reed v. Reed*, 404 U.S. 71 (1971) (Idaho probate code preferred men over women for appointment as administrator of a decedent's estate); *Goesart v. Cleary*, 335 U.S. 464 (1948) (state of Michigan banned female bartenders); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 395 (1937) (restrictions on hours for women); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (state law limited women's work hours, emphasizing that reproduction necessitated that the state protect women from themselves by regulating their activities even prior to pregnancy): *Bradwell v. Illinois*, 83 U.S. 130 (1872) (state of Illinois prohibited women's participation in the legal profession); *Grimison v. Board of Educ of City of Clay Ctr.*, 16 P.2d. 492, 493 (Kan. 1932) (state court held that cancellation of

laws that *required* women to take maternity leave during and after pregnancy, often without job security.[4] For example, New York's mandatory maternity leave law forbade the employment of women in factories or mercantile establishments within four weeks of childbearing. N.Y. Lab. Law § 206-b (McKinney 1973). In addition to state mandatory maternity leave laws applicable to private employers, state agencies had mandatory maternity leave policies for their own female employees. *See, e.g., Schattman v. Texas Empl. Comm'n,* 459 F.2d 32, 40-41 (5th Cir. 1972) (upholding mandatory maternity leave policy of Texas state agency and noting that other Texas agencies have similar policies). Those mandatory leave policies were unconstitutional. *See Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632 (1974).

The attitudes fostered by those discriminatory and invalid state laws continued, however, to affect behavior; indeed, those attitudes prompted another layer of state sex discrimination. Not only did such policies limit the workforce participation, including in state employment, of childbearing women, but they fostered sex discrimination against women more generally. Congress recognized that "the assumption

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a female teacher's contract upon marriage is appropriate for the benefit of the "human race").

[4] As of 1953, Connecticut, Massachusetts, Missouri, New York, and Vermont had statutes outright prohibiting the employment of women before and after childbirth. Edith L. Fisch & Mortimer D. Schwartz, *State Laws on the Employment of Women* 22 (1953). Vermont's law was not repealed until 1969, and Massachusetts' until 1974. Vt. Stat. Ann. tit. 21, § 444 (1947) (repealed 1969); Mass. Gen. Laws ch. 345 (1911) (repealed 1974).

that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace." S. Rep. No. 331, at 3 (1977).

Unfortunately, the legal protections provided by Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978 did not suffice to remedy many outmoded and unconstitutionally discriminatory workplace policies. During congressional hearings for the Parental and Medical Leave Act, a precursor to the FMLA, one witness testified that "[j]ob opportunities for [women with families] are limited, and [women] often miss pay increases and promotions. The lack of uniform parental and medical leave policies in the workplace has created an environment where discrimination is rampant." *Parental and Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. on Labor & Human Res., Part 2*, 100th Cong. 170 (1987) ("1987 Hearings") (testimony of Peggy Montes). Another witness testified that "[t]oo often women experience the nightmare of going in to their employer with the news that they are pregnant. Although they are valued employees, up to the moment they become pregnant, suddenly they find themselves unwanted." 138 Cong. Rec. H8, 226-27 (1992) (remarks of Rep. Hayes).

II. Congress Validly Abrogated State Immunity for FMLA Claims Regarding Self-Care Leave.

Congress may abrogate states' sovereign immunity in federal court if it: (1) makes its intention to abrogate clear in the language of the statute; and

(2) acts pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003). An exercise of power under Section 5 is valid if it is congruent and proportional to the injury being prevented. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

Congress's intent to abrogate state immunity in the FMLA cannot be questioned. *See* 29 U.S.C. § 2617(a)(2) (enabling lawsuits against state employers); *Hibbs*, 538 U.S. at 726 ("The clarity of Congress' intent here is not fairly debatable.").

Congress also had sufficient evidence of state sex discrimination to enact the self-care provision under the authority of Section 5 of the Fourteenth Amendment. Congress relied on a record of discriminatory leave policies in both the public and private sectors. The legislative history incorporates several studies that document extensive sex discrimination in employer leave policies that distinguish the amount of leave available to women and men. *See, e.g., Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Rel. and the Subcomm. on Labor Standards of the House Comm. on Educ. & Labor*, 99th Cong. (1986) at 151-288 (reproducing Catalyst, Report on a National Study of Parental Leaves (1986); n4 S. Rep. No. 103-3, at 14-15 (1993) (1989 Bureau of Labor Statistics survey found that 37% of large employers offered maternity leave while only 18% offered paternity leave); 138 Cong. Rec. S12,096 (1992) (1990 Bureau of Labor Statistics study found same). Congress heard testimony about discriminatory treatment in public and private sector leave policies. *See, e.g., Hibbs*, 538 U.S. at 730-31 (citing statement of Meryl Frank,

Yale Bush Center) ("public sector leaves don't vary much from private sector leaves"); *Id.* at 147 (statement of Washington Council of Lawyers referencing discriminatory treatment in both public and private sector leave policies).

Chief Justice Rehnquist's decision in *Nevada Dep't of Human Resources v. Hibbs* concluded that Congress validly abrogated state sovereign immunity in cases involving state employees and the subsections of the FMLA that cover leave by a worker to care for family members. 538 U.S. 721, 725 (2003). Although the Court did not directly address in *Hibbs* whether Congress validly abrogated state sovereign immunity in enacting the provision of the FMLA that allows a worker job-protected leave for her own serious health condition, the type of unconstitutional sex discrimination the Court *Hibbs* recognized as widespread also supports the self-care provision.

Following *Hibbs*, the majority of the courts to consider this issue have found, based upon incomplete consideration of the legislative record, that state sovereign immunity is not abrogated for self-care leave.[5] However, the briefs filed in those cases

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[5] *See, e.g.*, *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318 (5th Cir. 2008); *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871 (7th Cir. 2006); *Miles v. Bellfontaine Habilitation Ctr.*, 481 F.3d 1106 (8th Cir. 2007) (per curiam) (sovereign immunity not abrogated); *Touvell v. Ohio Dep't of Mental Retardation and Developmental Disabilities*, 422 F.3d 392 (6th Cir. 2005), *cert. denied*, 546 U.S. 1173 (2006) (sovereign immunity not abrogated); *Brockman v. Wyo. Dep't. of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004) (sovereign immunity not abrogated); *but see Montgomery v. Maryland*, 72 F. App'x 17, 19 (4th Cir. 2003) (per curiam) (sovereign immunity abrogated); *Lee v. State*, No. 07-1879, 2009 Iowa App. LEXIS 119 (Iowa Ct. App. Feb. 19, 2009).

failed to account for the full legislative record and did not appreciate the way in which Congress used the self-care as well as the family-care provisions to redress unconstitutional sex discrimination. Misled by the fact that self-care leave is available on a gender-neutral basis, those courts based their decisions on a flawed understanding of Congress's reasons for passing the self-care provision. They failed to give appropriate weight to or overlooked Congress's interest in stopping employment discrimination against women. *See, e.g.*, *Brockman v. Wyo. Dep't. of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004). In fact, the record is overwhelmingly clear that Congress was motivated to address employers' overbroad, sex-based assumptions that women, due to pregnancy and recovery from childbirth, have needs for self-care leave that male employees lack.

A. The Self-Care Provision is the Means by which Congress Provided Leave to Recover from Pregnancy and Childbirth, an Inherently Gendered Type of Leave.

Congress enacted the self-care provision of the FMLA, in part, to help women workers overcome the gender discrimination they faced because women, and only women, experience maternity-related disability due to pregnancy and childbirth. The fact is that the majority of working women are likely to need time away from work for pregnancy and recovery from childbirth. Women's participation in the workforce is close to its highest during the years that women tend to be pregnant or give birth. Bureau of Labor Statistics, U.S. Dep't. of Labor, Women in the Labor Force: A Databook (2010

Edition), Table 1 (2006), *available at* http://www.bls.gov/cps/wlf-table1-2006.pdf (72 percent of women ages 20 to 34 are in the labor force); Jane Lawler Dye, U.S. Census Bureau, Current Population Reports: Fertility of American Women: 2008, Table 1 (2010), *available at* http://www.census.gov/prod/2010pubs/p20-563.pdf (by age 34, 73 percent of women have had at least one child).

Congress intended FMLA self-care leave as a response to the need of women to be absent from work because of pregnancy and to recover from childbirth without fear of discrimination based on pregnancy or childbearing capacity. The FMLA itself and its legislative history frequently explain that pregnancy and recovery from childbirth are self-care issues. *See, e.g.*, 29 U.S.C. § 2601(b)(4) ("eligible medical reasons" include "maternity related disability"). The 1991 House Report accompanying the FMLA states that "[i]mmediately following childbirth a mother is typically physically disabled, and therefore is eligible for leave under 102(a)(1)(D) [the self-care provision]." H.R. Rep. No. 102-135, pt. 1, at 43 (1991). The report also states that a "serious health condition" should be understood to include "ongoing pregnancy, miscarriages, complications or illness related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth." *Id.* at 45. According to both the 1991 report and a subsequent 1993 report:

> A pregnant patient is generally under continuing medical supervision before childbirth, may require several days off for severe morning sickness or other complications, receives inpatient care for childbirth, and is under medical supervision requiring additional time off during

> the recovery period from childbirth. The legislative history of the Pregnancy Discrimination Act established that the medical recovery period for a normal childbirth is 4 to 8 weeks, with a longer period where surgery or other complications develop.

Id. at 46; H.R. Rep. No. 103-8, pt. 1, at 41 (1993).

Similarly, the Senate report for the 1991 version of the bill states that the bill's "provision of temporary medical leave would ensure that new mothers don't lose their jobs when they temporarily cannot work due to pregnancy- and childbirth- related disability (as part of ensuring that employees in general do not lose their jobs when they are temporarily unable to work because of a serious health condition)." S. Rep. No. 102-68, at 23 (1991). Testimony at hearings held by the House of Representatives on earlier versions of the Act reinforces the Report. For example, in 1985, Congress heard testimony from Professor Wendy Williams that "the bill provides for leaves and the right to return for workers who are disabled for medical reasons and, in addition, for parental leave. The parental leave is solely for the purpose of childrearing. . . . The disability provision covers any kind of medical reason for not being able to work, including, of course, pregnancy-related matters such as childbirth." *Parental and Disability Leave: Joint Hearing on H.R. 2020 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of the H. Comm. on Post Office and Civil Serv. and the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 99th Cong. 18 (1985). The provision of self-care leave, including but not limited to leave for sex-specific pregnancy–

related conditions, made self-care leave equally available to male and female workers and thus blunted the perception that women, because they bear children, are more likely than men to be absent from work. Because that overbroad perception led to employment discrimination against women, the FMLA provision seeking to blunt rests on a constitutional predicate appropriate to use of Congress's Section 5 power.

B. The Self-Care Provision Was Central to Congress's Response to Women Losing Their Jobs Because of the Need for Leave for Pregnancy and Recovery from Childbirth.

The passage of the FMLA was a step in the ongoing work of Congress to rid the workplace of sex discrimination. First, Congress passed statutes like Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978 (PDA). Prior to the passage of Title VII and the PDA, entire occupations were foreclosed to women, and state statutes commonly limited their working hours and conditions. *Hibbs* at 729; U.S. Dep't of Health, Educ. and Welfare, Occupational Legislation: Health and Safety, Public Health Service Publication No. 357 (1970) (listing health and safety legislation by state, including prohibitions on the employment of women in or about any mine, quarry, or coal breaker, Ariz. Rev. Stat. Ann. § 23-261; (*repealed by* Laws 1973, ch. 133 § 35, eff. Aug. 8, 1973; Laws 1973 ch. 172 § 58 eff. Aug. 8, 1973); prohibitions on the employment of women four weeks before and four weeks after childbirth, Conn. Gen. Stat. § 31-26; (*repealed by* P.A. 53, § 1, eff. April 17, 1972)); and prohibitions on the employment of women in specific occupations that

require the routine lifting of more than 25 pounds, Ohio Rev. Code Ann. § 4107.43) (*repealed* 1982). Women also were commonly fired or forced to take leave when they became pregnant, regardless of their ability to work. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977) (public employer required pregnant employees to take leave of absence, during which they did not receive sick pay and lost job seniority, contrary to employer's disability leave policies). *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (striking down rules requiring leave after the fifth month of pregnancy until three months after birth); *Women in City Gov't United v. City of New York*, 563 F.2d 537 (2d Cir. 1977) (striking down a city rule that pregnant women stop working in their fifth month of pregnancy); *Somers v. Aldine Indep. Sch. Dist.*, 464 F. Supp. 900 (S.D. Tex. 1979) (striking down a requirement that pregnant women take an unpaid leave of absence in their third month or be terminated). Such regulations contributed to a long history of state-sponsored violations of the constitutional rights of women workers.

The protections of the anti-discrimination statutes, however, were insufficient because they only required employers to treat pregnancy like other disabilities—not to grant women job-protected time off from work for pregnancy or to recover from childbirth. In passing the self-care leave provision of the FMLA, Congress was keenly aware of the importance of job-protected self-care leave for women who were pregnant and needed leave to maintain their own health. As early as 1985, Congress heard testimony that:

> We are especially concerned with the more than 6.4 million women who are single heads of

> household for whom, along with their financially precarious families, lack of job protection renders illness a catastrophe. . . . The Parental Leave and Disability Act [a precursor to the FMLA] would fill that gap by creating a reasonable time period during which an absence from work for medical reasons cannot result in termination of an employee.

Id. at 8 (statement of Professor Wendy Williams).

Through the FMLA hearings, Congress heard testimony regarding how women, despite the protections of Title VII and the PDA, lost their jobs after becoming pregnant or after childbirth. *Parental and Medical Leave Act of 1987: Hearing on S. 249, Pt. 2, Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the S. Comm. on Labor and Human Resources*, 100th Cong. 16, 19 (1987) (statement of Linda Pillsbury (despite being assured that she would have a job to return to, she was told three weeks after her child was born that her job no longer existed); statement of Rebecca Webb (despite a verbal agreement with her supervisor for three months of leave post-childbirth, she was told at seven months pregnant that she would not receive any leave and would have to renegotiate her contract immediately)). Eleanor Holmes Norton, then a law professor, testified that "women who are temporarily unable to work due to pregnancy, childbirth and related medical conditions such as morning sickness, threatened miscarriage, or complications arising from childbirth, often lose their jobs because of the inadequacy of their employer's leave policy." *Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of*

the H. Comm. on Post Office and Civil Serv., 100th Cong. 79 (1987).

Similarly, at another hearing in 1987, Congress heard testimony regarding a version of the FMLA from Donna Lenhoff, then the Associate Director for Legal Policy and Programs at the Women's Legal Defense Fund. Ms. Lenhoff testified that the job-protected leave provided by the bill

> means security and certainty for the American family faced with the serious health problems of one of its breadwinners. This is an essential protection for single-parent and low-income families. It means that one of the risks that currently faces families planning to have children, the risk of job loss of the mother, is eliminated. . . . It means that women deciding whether to bear children can be secure in knowing that they can continue their incomes after childbirth and the attendant disability period is over.

Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor, 100th Cong. 157-63 (1987).

C. A Key Reason Congress Included All Types of Self-Care Leave in the FMLA Was to Deter Ex Ante Employment Discrimination Based on Overbroad, Sex-Based Assumptions about Women's Leave Needs.

By covering more than pregnancy and recovery from childbirth, Congress reduced any incentive employers had to discriminate against women for

their pregnancies or potential pregnancies, thereby acting to limit employment discrimination and stereotyping and increase opportunities for women. Congress was keenly aware that a provision granting medical leave solely to pregnant women could result in the unintended consequence of further discrimination, in violation of women's constitutional rights. As Eleanor Holmes Norton testified,

> The bill's simple two-fold test for availability of leave means that employers will be required to treat employees affected by pregnancy, childbirth, and related medical conditions in the same manner as they treat other employees similar in their ability or inability to work—in harmony with their obligations under the Pregnancy Discrimination Act of 1978. Faced with the knowledge that job-protected leaves were required for working mothers and working mothers only, employers would very likely be reluctant to hire or promote women of child-bearing age. Under the proposed legislation, however, because employers would be required to provide job-protected leaves for all employees in circumstances *that affect them all approximately equally*, they would have no incentive to discriminate against women.

Family and Medical Leave Act of 1987: Joint Hearing on H.R. 925 Before the Subcomm. on Civil Serv. and the Subcomm. on Compensation and Employee Benefits of the H. Comm. on Post Office and Civil Serv., 100th Cong. 29 (1987) [emphasis supplied]. The reality is that, when all types of serious medical conditions are considered together, men's and women's needs for self-care leave are not very

different.[6] The self-care provision, by allowing leave for all serious medical conditions, thus blunts assumptions – shared by state and private employers alike – that because women bear children and men do not, women have significantly greater leave needs. Those assumptions fuel the precise type of unconstitutional discrimination identified in *Hibbs* as so widespread, and it is that discrimination to which the self-care provision responds.

The House Report on the Parental and Medical Leave Act (another precursor of the FMLA), which provided federal employees with job-protected leave for medical reasons and to care for a new child, stated that leave for pregnancy and recovery from childbirth had to be covered as disability leave, rather than maternity leave, because "a special 'maternity leave' requirement could be used to deny women job opportunities. Faced with the knowledge that job-protected leaves were required for working mothers and working mothers only, hard-pressed employing agencies would be very likely to be reluctant to hire or promote women of child-bearing age." H.R. Rep. No. 99-699, at 4 (1986).

Similarly, the 1991 House Report on the FMLA stated:

> A law providing special protection to women, or any defined group, in addition to being

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[6] Data collected by the Department of Labor reveals that 58% of self-care leave takers were men and 62% were women, including women who took leave for "maternity-disability." *See* Table A2-2.6 U.S. Dep't of Labor, Wage and Hour Div., Reasons for All Leaves Taken within Demographic Groups, found at http://www.dol.gov/whd/fmla/ APPX-A-2-TABLES.htm.

> inequitable, runs the risk of causing discriminatory treatment. Employers may be less inclined to hire women or members of any group provided special treatment. For example, legislation addressing the needs of pregnant women only might encourage discriminatory hiring practices against women of child bearing age. Legislation addressing the needs of all workers equally does not have this effect. By addressing the serious leave needs of all employees, the FMLA avoids providing employers the temptation to discriminate.

H.R. Rep. No. 102-135, pt. 1, at 27-28 (1991); *see also* S. Rep. No. 103-3, at 16 (1993) (explaining that the FMLA, by granting leave to all workers who suffer from a serious health condition, avoids the risk of causing discrimination against women, especially those of childbearing age); H.R. Rep. No. 103-8, pt. 1, at 29 (1993) (same).

Providing further proof that the self-care provision sought to prevent sex discrimination, the 1991 Senate Report on the FMLA declared:

> [A] significant benefit of the temporary medical leave provided by this legislation is the form of protection it offers women workers who bear children. Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability. Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in

> hiring policies; legislation helping all workers equally does not have this effect.

S. Rep. No. 102-68, at 30 (1991).

Congress was well aware that a law requiring employers to provide leave only for recovery from pregnancy and childbirth would reinforce gender stereotypes regarding women as unreliable workers and "mothers first." Such a law could easily become an excuse for employers to discriminate against women because of their pregnancy or childbearing potential. Therefore, in the FMLA, Congress ensured that leave could be used for any self-care need that met the definition of serious health condition. The law allows for leave to be taken by men as well as women and for a wide variety of conditions. By covering more than pregnancy and recovery from childbirth, Congress reduced any incentive employers had to discriminate against women for their pregnancies or potential pregnancies, thereby acting to limit employment discrimination and stereotyping and increase opportunities for women.

D. The FMLA's Self-Care Provision Cannot be Divorced from the Family-Care Provision without Undermining the FMLA's Protections Against Sex-Based Workplace Discrimination.

A decision denying state employees the right to enforce the FMLA's self-care provision would undermine the FMLA's overall effectiveness and severely hamper efforts to equalize the treatment of men and women in the workplace. In *Hibbs*, the Court affirmed Congress' abrogation of state sovereign immunity under the FMLA, holding that pursuant to Section 5 of the Fourteenth Amendment, Congress

could appropriately reduce workplace discrimination against women by requiring employers equally to grant female and male employees equal time off to care for others. *Hibbs* 538 U.S. at 740. The promises of the family-care provision and the FMLA's ability successfully to address gender-based discrimination depend, however, on the additional protections guaranteed by the statute's self-care mandate. Though the FMLA grants both men and women the right to take time off to care for a newborn, adopted child, or family member, traditional notions about the role of women as primary care providers suggest that women are more likely than men to take advantage of the FMLA's family-care provision. *See* Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harv. C.R.-C.L. L. Rev. 415, 441-2 (2011); Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege?*, 21 Yale J.L. & Feminism 161, 167 (2009).

The self-care provision acts to counter employer assumptions that the rights granted by the FMLA would be invoked primarily by women and serves to make the statute as a whole more effective. The availability of self-care leave to men serves to blunt the force of stereotypes of women as primary caregivers by increasing the odds that men and women will invoke the FMLA's leave provisions in near-equal numbers. The FMLA's effectiveness in addressing gender discrimination in the workplace therefore depends upon understanding its provisions as reliant upon one another and reading the statute as a whole.

E. The Majority of State Laws at the Time of the Enactment of the FMLA Were Inadequate or Discriminatory.

When Congress passed the FMLA, it did so against a backdrop of states that failed to provide adequate leave for women for pregnancy and recovery from childbirth, or that provided leave in a way that reinforced gender stereotypes and encouraged discrimination against women workers. Prior to the passage of the FMLA, only twelve states and the District of Columbia provided women job-protected leave for pregnancy and recovery from childbirth. Jane Waldfogel, Family Leave Coverage in the 1990s (App.: The Role of States), Monthly Lab. Rev. 21 (Oct. 1999), *available at* http://www.bls.gov/opub/mlr/1999/10/art2full.pdf. As of 1989, in at least four states, women were entitled to pregnancy leave while men had no equivalent right to take time off to deal with their health conditions. *See* Wendy S. Strimling, *Comment: The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig After Cal Fed.*, 77 Cal. L. Rev. 171, 175-79 (1989); *see also Hibbs* at 733 n.6 (listing states that guaranteed leave only to female employees for pregnancy and childbirth).[7] Connecticut, for example, had a gender-neutral family leave law but

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[7] Additionally, some state workers were covered by union contracts that provided for disability leave that could be used for pregnancy-related disability and recovery from childbirth. These contracts, however, covered only the employees in a specific bargaining unit. *Parental and Medical Leave Act of 1987: Hearing on S. 249, Pt. 1, Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 100th Cong. 351, 358 (1987) (Report of Parental Leave in AFSCME Contracts).

made medical disability leave available to pregnant women alone. Strimling at 178.

Thus, in most states, at the time of the passage of the FMLA, women had no protection under Title VII and the Pregnancy Discrimination Act from being fired for talking leave for their own pregnancy-related disability. And in a significant number of states, women had some access to leave to address pregnancy-related disability, but these laws applied to women only, creating a situation that Congress believed could promulgate further employer discrimination and stereotyping.

III. The Remedies Provided in the FMLA for Self-Care Leave Fit the Injury the Statute Seeks to Prevent.

The third part of the test for abrogation of state sovereign immunity under *Hibbs* is whether the means chosen by Congress "exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Hibbs*, 538 U.S. at 728 (internal citations and quotations omitted). In *Hibbs*, the Court found that the FMLA caregiving provision met this standard. Because Congress enacted the self-care provision of the FMLA—like the caregiving provision—in response to gender discrimination, the self-care provision meets the "congruent and proportional" standard as well.

In *Hibbs*, the Court ruled:

> By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations

> simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

Hibbs, 538 U.S. at 737.

In a similar manner, Congress in the self-care provision created an across-the-board right to leave that is open to both men and women for any serious health condition. In doing so, Congress sought to redress widespread sex discrimination by blunting incentives for employers to discriminate against women because of their pregnancies or childbearing potential. By allowing women and men to take leave for reasons not associated with childbirth, as Mr. Coleman sought to do in this case, Congress also ensured that the statute did not discriminate against women or place a higher value on their recovery from pregnancy and childbirth than on men's recovery from equally serious health conditions.

FMLA leave is only available to workers who have been with their employer for a specific length of time, and only employers with fifty or more employees are covered. 29 U.S.C. § 2611(2)(A) & (4)(A). Employees rarely take the full twelve weeks of leave authorized under the FMLA. Rather, the most frequent duration of leave is ten days. David Cantor et al., U.S. Dep't of Labor, Balancing the Needs of Families and Employers: The Family and Medical Leave Surveys, Ch. 2, 2-4 (2000) (*available at* http://www.dol.gov/whd/fmla/chapter2.pdf). Eighty percent of the leave taken is for forty days or less. *Id.* While helping

millions of employees, the FMLA's cost to businesses has been minimal. *Id.* at 6-9, 6-13.

The FMLA allows for limited monetary damages consisting of lost wages or salary and interest, or, if no compensation was lost, actual monetary losses (capped at an amount equal to twelve weeks of wages or salary). 29 U.S.C. § 2617(a)(1)(A)(i)(I)&(II) & (ii). All of the factors limiting relief under the FMLA that the Court found "significant" in reaching its conclusion that the caregiving provision of the FMLA was an appropriate response to gender discrimination exist for the self-care provision as well. *Id.* at 738-39 (noting that the FMLA provides only unpaid leave, requires employees to meet certain tenure requirements, requires notice and certification, limits damages, and makes certain high-level employees and elected officials ineligible for leave). Therefore, this Court should find that the self-care provision meets the third prong of the *Hibbs* test and that Congress validly abrogated state immunity in the self-care provision of the FMLA.

IV. The FMLA Provides Necessary Time Away From Work to Allow Workers to Recover from Serious Health Conditions and Provides Job Protection for Workers Who Would Otherwise Suffer the Economic Consequences of Discrimination.

The FMLA offers critical protections to workers across the country, including millions of state employees.[8] Since 1993, FMLA leave has been used

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[8] Over 5.3 million Americans are employed by state governments. U.S. Census Bureau, State Government Employment Data: March 2009 – United States Totals (2011), *available at* http://www2.census.gov/govs/apes/09stus.txt.

over 100 million times to take job-protected leave. 73 Fed. Reg. 7877 (February 11, 2008). The Department of Labor estimates that each year, 6.1 million workers use FMLA leave. *Id.*

Congress was motivated to pass the FMLA to address a form of discrimination that can have dire economic consequences, particularly for families headed by single women. *See, e.g.*, *Family and Medical Leave Act of 1991: Hearing on S. 5 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 102d Cong. 3 (1991) (statement of Sen. Christopher Dodd) ("Since 1970, there has been a 700 percent increase in the number of children who live with mothers who have never been married. . . . Typically, these families have the most tenuous ties to the labor force to begin with and have the least access to employer sponsored leave polices. . . . Very often, nothing stands between them and the welfare rolls if a job is lost due to a serious family crisis."). The Senate report accompanying the 1991 version of the FMLA noted that "[w]omen are in the workforce out of economic necessity. Two out of every three women working outside the home today are either the sole providers for their children or have husbands who earn less than $18,000 a year." S. Rep. 102-68, at 22 (1991).

The concerns expressed by Congress are equally valid today. Nationally, 59 percent of women ages sixteen and over, and 71 percent of men in the same age group, were in the workforce in 2010. Bureau of Labor Statistics, U.S. Dep't of Labor, Current Population Survey: Household Data Annual Averages, tbl. 2 (2010), *available at* http://www.bls.gov/cps/cpsaat2.pdf. Sixty-four percent of children under six years of age and 72 percent of children between

the ages of six and seventeen live in households where all available parents are in the labor force. U.S. Census Bureau, 2009 American Community Survey 1-Year Estimates, tbl. B23008 (2009), *available at* http://factfinder.census.gov. Nineteen percent of all family households are headed by a woman with no husband present. *Id.* at tbl. B11001. Thus, a woman's ability to work is often critical to her family's economic well-being. Without measures like the FMLA's self-care provision, many working women and their families would face unstable and potentially disastrous financial situations.

V. State Employees Who Exercise Their FMLA Right to Self-Care Leave Need and Deserve Protection from Retaliation.

In enacting the FMLA, Congress clearly intended to grant state employees access to job-protected leave to attend to their health needs. The FMLA's leave provisions and job protections would be rendered meaningless unless eligible employees – including those who work for state governments – can request and take leave without fear of reprisal.

Unfortunately, many state employees have suffered adverse consequences or even lost their jobs after seeking to exercise their FMLA rights to self-care leave for a serious illness. In this case, the Petitioner Daniel Coleman was fired within hours of requesting medical leave pursuant to his doctor's orders. Sadly, Mr. Coleman is not alone. Retaliation against employees who assert their entitlement to federally protected leave is woefully common. For instance, the State of Mississippi fired James Bryant while he recovered from injuries sustained in an automobile accident. *Bryant v. Miss. State Univ.*, 329 F. Supp. 2d 818 (N.D. Miss. 2004). The State of

Missouri fired Larry McKlintic after he requested time off for back surgery. *McKlintic v. 36th Judicial Circuit Court*, 464 F. Supp. 2d 871 (E.D. Mo. 2006), *aff'd*, 508 F.3d 875 (8th Cir. 2007). The State of Michigan discharged Ricardo Diaz following his request for intermittent FMLA leave so that he could obtain treatment for a hereditary chronic cardiac condition and diverticulitis. *Diaz v. Mich. Dep't of Corr.*, No. 1:09-cv-1109, 2010 U.S. Dist. LEXIS 134743, at *1-2 (W.D. Mich. Dec. 21, 2010). The State gave him a written notice of discipline for missing work and, after Diaz was hospitalized for four days, the State terminated him for "time and attendance violations." *Id.* at *2-3.

All too frequently, workers suffer negative consequences after requesting or taking leave to address their medical needs. Indeed, fifty-three percent of the FMLA complaints filed between 2001 and 2008 involved a refusal to restore the employee to an equivalent position or termination in retaliation for requesting or taking FMLA leave. U.S. Dep't of Labor, Wage and Hour Div., 2008 Statistics Fact Sheet, *available at* http://www.dol.gov/whd/statistics/2008FiscalYear.htm. Survey data collected by the U.S. Department of Labor indicates that over 357,000 leave-takers were downgraded to a lower position at work after their leave in the first seven years after the FMLA was enacted. U.S. Dep't of Labor, Wage and Hour Div., The 2000 Survey Report ch. 4, *available at* http://www.dol.gov/whd/fmla/chapter4.htm.

Individuals who experience serious illness or injury, including state employees, should be able to assert their rights to self-care leave and deserve protection from retaliation, consistent with the plain language of the FMLA. The Court has long recog-

nized the importance of robust protection from workplace retaliation in other related contexts. Title VII, the Court has said, "depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. . . . Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (internal quotation marks and citation omitted). This is because "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." *Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S. Ct. 846, 852 (2009) (quoting Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005)). Most recently, the Court again reiterated the importance of protections from retaliation in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2011). In that case, the Court noted:

> [The Fair Labor Standards Act] relies for enforcement . . . upon information and complaints received from employees seeking to vindicate rights claimed to have been denied. And its antiretaliation provision makes this enforcement scheme effective by preventing fear of economic retaliation from inducing workers quietly to accept substandard conditions.

Id. (internal quotation marks and citations omitted).

If contrary to the plain language of the statute, states cannot be held liable for retaliating against employees who invoke their right to self-care leave, states will have little incentive to comply with the substantive requirements of the FMLA. The statu-

tory purpose cannot be fulfilled unless state employees can request leave without fear of retaliation.

CONCLUSION

For the above reasons, Congress validly abrogated state sovereign immunity with respect to the FMLA's self-care provision. The judgment of the Fourth Circuit should be reversed and remanded.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 10-1016

In the Supreme Court of the United States

DANIEL COLEMAN,
Petitioner,

v.

MARYLAND COURT OF APPEALS, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MICHIGAN, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Do the States retain sovereign immunity from claims for money damages based on alleged violations of the "self-care" provision of the Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(D)?

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INTEREST OF AMICI CURIAE

The States employ approximately 5.3 million full- and part-time workers. U.S. Census Bureau, *2010 Public Employment and Payroll Data: State Governments*, http://www2.census.gov/govs/apes/10stus.txt. As some of the Nation's largest employers, the States have a significant practical interest in federal employment laws and policies, particularly those that may expose state governments to liability for civil damages. And as guardians of their citizens' public fisc, the States also have an interest in ensuring that any abrogation of their immunity comports with the constitutional framework for such action. Because the decision below adhered to the Court's well-established precedent for determining when Congress may abrogate the States' immunity under Section 5 of the Fourteenth Amendment, the States have an interest in seeing the Fourth Circuit's decision upheld.

SUMMARY OF THE ARGUMENT

The Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601-2654 (2006), was enacted to create a nationwide labor standard providing up to 12 weeks of unpaid leave to persons working for private or public employers with 50 or more employees. When it was adopted, the FMLA entitled eligible employees to leave in four specified situations: the birth of a child, *id.* § 2612(a)(1)(A); the adoption of a child or placement of a foster child, *id.* § 2612(a)(1)(B); the need to care for a parent, child, or spouse with a serious health condition, *id.* § 2612(a)(1)(C); and the inability to work due to the

employee's own serious health condition, *id.* § 2612(a)(1)(D).[1]

Many States provided their employees personal sick leave and leave to care for ailing family members prior to enactment of the FMLA, and the States have uniformly endorsed the motives behind the FMLA and the policies it has inspired. And the amici States fully recognize that the FMLA applies to state governments and do not challenge the validity of any of its provisions as Commerce Clause legislation. Indeed, Texas and the other amici States instruct their agencies and employees to follow the FMLA's letter and spirit. But the amici States are also charged with protecting their citizens' public fisc from awards of monetary damages that would drain scarce state financial resources when such awards are not authorized by the Constitution.

To validly exercise its authority under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity, Congress must identify unconstitutional conduct by States and enact an appropriate remedy for those violations. *City of Boerne* v. *Flores*, 521 U.S. 507, 519-520 (1997). In this case, consistent with the decisions of eight other circuits, the Court of Appeals correctly determined that the "self-care" provision of the FMLA, 29 U.S.C. § 2612(a)(1)(D), does not validly abrogate the States' sovereign immunity from suit. Pet. App. 12. The reason is straightforward: when Congress

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1. Congress recently amended the FMLA to provide leave for exigencies arising from a relative's service in the Armed Forces. 29 U.S.C. § 2612(a)(1)(E); Pub. L. No. 110-181, § 585, 122 Stat. 3, 129 (2008).

adopted the self-care provision of the FMLA, it was not attempting to remedy a pattern of unconstitutional state conduct. Congress identified no such pattern of conduct. In fact, Congress specifically documented and highlighted the fact that most States were ahead of the Federal Government in addressing the family and medical leave needs of their employees. Accordingly, the judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. CONGRESS HAS LIMITED POWER TO ABROGATE STATE SOVEREIGN IMMUNITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

Immunity from suit "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999).[2] And, as this Court has made clear, the States' preexisting immunity that the Eleventh Amendment secured has a broader reach than merely stripping federal courts of jurisdiction over claims against one State by the

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2. The Court has also explained that the phrase "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden*, 527 U.S. at 713.

citizens of another.[3] Specifically, the Court has explained that while the terms of the Amendment reference only suits against a State by citizens of another State, its cases have recognized that a State's sovereign immunity extends to suits by citizens against their own State. See, *e.g.*, *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 72-73 (2000); *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669-670 (1999).

Congress can abrogate state sovereign immunity only when: (1) it unequivocally expresses its intent to abrogate the immunity; and (2) it acts "pursuant to a constitutional provision granting Congress the power to abrogate." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55, 59 (1996). The Court has already determined that the FMLA satisfies the first requirement. *Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 726 (2003). Therefore, this case turns on whether Congress acted within its constitutional authority when it sought to abrogate the States' immunity for purposes of the FMLA's self-care provision.

Section 1 of the Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section 5 of the

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3. The Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Amendment grants Congress the power "to enforce" the substantive guarantees of Section 1 of the Amendment by enacting "appropriate legislation." U.S. CONST. amend. XIV, § 5; see also *City of Boerne*, 521 U.S. at 536.

Because Congress's enforcement authority under Section 5 is both remedial and preventative, the Court has recognized that "Congress may, in the exercise of its Section 5 power, do more than simply proscribe conduct that [the Court has] held unconstitutional." *Hibbs*, 538 U.S. at 727. "Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81.

Nonetheless, although state sovereign immunity is subject to Congress's enforcement power under Section 5 of the Fourteenth Amendment, that power is limited. As the Court confirmed in *City of Boerne* and its progeny, it is the responsibility of the Court, not Congress, to determine the Fourteenth Amendment's substantive meaning and define the substance of its constitutional guarantees. See *Hibbs*, 538 U.S. at 728; *Kimel*, 528 U.S. at 81; *City of Boerne*, 521 U.S. at 519-524. And Section 5 legislation that reaches beyond the scope of Section 1's specific guarantees must be an appropriate remedy for identified constitutional violations, not an "attempt to substantively redefine the States' legal obligations." *Kimel*, 528 U.S. at 88.

The Court has likewise made clear that, "in order to authorize private individuals to recover money damages

against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001). Thus, in order to validly exercise its Section 5 authority to abrogate state sovereign immunity, Congress must meet the test described in *City of Boerne* and its progeny: it must (1) identify unconstitutional conduct by States and (2) enact an appropriate remedy for those violations. *Hibbs*, 538 U.S. at 728-729; see also *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring) ("The predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity.").

Applying this test, the Court has invalidated several congressional attempts to improperly expand its Section 5 power. See *Garrett*, 531 U.S. at 374 (invalidating Congress's attempt to subject States to suit under Title I of Americans with Disabilities Act); *Kimel*, 528 U.S. at 82-83 (same under Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (same under Patent Act); *City of Boerne*, 521 U.S. at 532 (holding that the Religious Freedom Restoration Act was an invalid exercise of Congress's Section 5 authority). In so doing, the Court has made clear that, when Congress enacts legislation that reaches beyond the scope of Section 1's specific guarantees, it must meet the *City of*

Boerne test to successfully abrogate state sovereign immunity.

II. CONGRESS DID NOT VALIDLY ABROGATE THE STATES' SOVEREIGN IMMUNITY IN THE FMLA'S SELF-CARE PROVISION.

The Court's Section 5 cases present the framework for assessing whether legislation meets the *City of Boerne* test and appropriately abrogates the States' sovereign immunity. See, *e.g.*, *Garrett*, 531 U.S. 365-368; *Kimel*, 528 U.S. at 80-82. The first step of the analysis requires the court to "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. The second step is to determine whether the legislative means adopted by Congress have a congruence and proportionality to the constitutional injury to be prevented or remedied. See, *e.g.*, *Kimel*, 528 U.S. at 81 ("[R]ecognizing that 'Congress must have wide latitude in determining where [the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in governing law] lies,' we [have] held that '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" (quoting *City of Boerne*, 521 U.S. at 520)).

In performing the second step, *i.e.*, deciding whether legislation is congruent to a constitutional violation, the Court has consistently looked to the legislative record to determine whether Congress has identified a history and pattern of unconstitutional state action. See, *e.g.*, *Garrett*, 531 U.S. at 368-374; *Kimel*, 528 U.S. at 90-91; *Fla. Prepaid*, 527 U.S. at 640. When these steps are

properly performed concerning the self-care provision of the FMLA, it is evident—as the Court of Appeals correctly concluded—that this provision is not designed to address gender-based discrimination, and in any event Congress failed to identify any history or pattern of unconstitutional state action that could support the abrogation of state immunity through the self-care provision.

A. The Self-Care Provision Is Designed To Relieve Economic Burdens Imposed on Temporarily Disabled Employees and To Prevent Discrimination Against Them.

Petitioner's analysis of the question whether the self-care provision properly abrogates the States' immunity is flawed at the outset because it is premised on the mistaken assumption that it was designed to address gender-based discrimination. See Pet. Br. 13. Petitioner correctly notes that the scope of constitutional protection against gender-based discrimination under the Fourteenth Amendment is broader than that against mere arbitrary classifications. See *id.* at 30-34. Where gender-based discrimination is at issue, a State must justify its discrimination by a showing of considerably more than mere rationality. See, *e.g.*, *United States* v. *Morrison*, 529 U.S. 598, 620 (2000). And gender-based discrimination violates the Equal Protection Clause unless it "serves important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (citation and internal quotation marks omitted).

But it is apparent from both the FMLA's text and its legislative history that Congress did not intend to remedy gender-based discrimination with the self-care provision. First, the text of the self-care provision itself does not suggest that its purpose was to combat unconstitutional gender-based discrimination in the workplace. It allows for personal medical leave when a "serious health condition" prevents any employee from performing his or her job. 29 U.S.C. § 2612(a)(1)(D). And the term "serious health condition" in the self-care provision is not limited to or focused on those health conditions wholly or predominantly experienced by female workers, but rather is broadly defined to include *any* "illness, injury, impairment, or physical or mental condition" that involves "inpatient care" at some type of medical facility or "continuing treatment by a health care provider." *Id.* § 2611(11).[4] Likewise, the congressional finding most relevant to the self-care provision makes no distinction between male and female employees. See *id.* § 2601(a)(4) (stating that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods").[5]

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4. Common sense also dictates that "'[s]erious health conditions are not necessarily related to family and gender discrimination.'" *Hale* v. *Mann*, 219 F.3d 61, 69 (2d Cir. 2000) (quoting *Garrett* v. *Univ. of Ala. Bd. of Trs.*, 193 F.3d 1214, 1220 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001)).

5. The lack of distinction between male and female employees in Congress's relevant finding is unsurprising, given that the evidence before it showed that men and women are almost equally likely to take personal medical leave. See H.R. REP. NO.

Likewise, the legislative history of the FMLA establishes two motivations for the inclusion of the self-care provision, both of which are unrelated to gender-based discrimination, and neither of which can support the abrogation of the States' sovereign immunity. The primary purpose of the self-care provision was relieving the economic burdens on employees and their families that are imposed by illness-related job loss. See, *e.g.*, S. REP. No. 103-3, at 11 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 13-14 ("The *fundamental rationale* for [a personal medical leave] policy is that it is unfair for an employee to be terminated when *he or she* is struck with a serious illness and is not capable of working. Job loss because of illness has a particularly devastating effect on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads the household." (emphases added)); H.R. REP. No. 101-28, pt. 1, at 23 ("The temporary medical leave requirement is intended to provide basic, humane protection to the family unit when it is most in need of help. It will also

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101-28, pt. 1, at 15 (1989) ("Recent studies provided to the [House Education and Labor] Committee indicate that men and women are out on medical leave approximately equally. Men workers experience an average of 4.9 days of work loss due to illness or injury per year, while women workers experience 5.1 days per year. The evidence also suggests that the incidence of serious medical conditions that would be covered by medical leave under the bill is virtually the same for men and women.").

help reduce the societal cost born [sic] by government and private charity.").[6]

The second purpose of the self-care provision was to prevent employment discrimination against those with serious health problems. See, *e.g.*, S. REP. No. 103-3, at 12 (citing testimony that a quarter of all cancer survivors face "some form of employment discrimination" and that "such discrimination against qualified employees costs society millions of dollars in lost wages, lost productivity and needless disability payments"); H.R. REP. No. 101-28, pt. 1, at 23 ("[A] worker who has lost a job due to a serious health condition often faces future discrimination in finding a job which has even more devastating consequences for the worker and his or her family.").[7]

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6. See also *Touvell* v. *Ohio Dep't of Mental Retardation & Developmental Disabilities*, 422 F.3d 392, 401 (6th Cir. 2005) ("One purpose of [the self-care provision] was alleviating the economic burdens on employees and their families of illness-related job-loss."); *Laro* v. *New Hampshire*, 259 F.3d 1, 12 (1st Cir. 2001) ("Attention to the legislative history reveals that Congress's primary motivation for including the personal medical leave provision contained in subsection (D) was to protect families from the economic dislocation caused by a family member losing his or her job due to a serious medical problem.").

7. See also *Touvell*, 422 F.3d at 401 ("The other purpose of the self-care provision was to prevent employment discrimination against those with serious health problems."); *Laro*, 259 F.3d at 12-13 ("A secondary motivation that appears in the legislative history is a concern to protect workers who were temporarily disabled by serious health problems from discrimination on account of their medical condition.")

B. Because Congress Was Not Remedying Unconstitutional State Conduct, It Could Not Validly Abrogate the States' Sovereign Immunity Through the Self-Care Provision.

Congress's concern with relieving economic burdens on temporarily disabled workers and their families "clearly goes to Congress's power under the Commerce Clause and not Section 5." *Laro*, 259 F.3d at 12. Congress may not abrogate the States' sovereign immunity through its Commerce Clause power. See *Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 79.

And, to the extent the self-care provision targets discrimination based on disability, it is subject to rational-basis review. *Garrett*, 531 U.S. at 366-367. Under rational-basis review, to make the necessary finding of unconstitutional State action, Congress would have been required to identify disparity of treatment of temporarily disabled workers involving *irrational* State conduct. See *id.* ("Under rational-basis review, where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." (citations and internal quotation marks omitted). Making such a finding would be particularly difficult given that the Court has made clear that the Fourteenth Amendment does not require the States to make special

accommodations for the disabled, so long as their actions toward such individuals are rational. *Id.* at 367.

But the Court need not reach the question whether the self-care provision could be congruent and proportional to address a pattern of constitutional transgressions by the States against temporarily disabled workers, because the legislative record reveals no such conduct on the part of the States. Rather, the record establishes that "Congress identified no link between the desire to provide a safety net for the seriously ill, or the desire to prevent discrimination against the seriously ill, and any pattern of discriminatory stereotyping on the part of states as employers." *Touvell*, 422 F.3d at 401-402; see also *Kazmier* v. *Widmann*, 225 F.3d 519, 528 (5th Cir. 2000), ("The legislative record for the FMLA is devoid of any evidence of a pattern of discrimination by the States against the temporarily disabled . . . ."), *overruled in part by Hibbs*, 538 U.S. 721. And, "[w]ithout direct evidence of substantial unconstitutional discrimination by the States [against the temporarily disabled], there simply is no Fourteenth Amendment evil to which [the self-care provision] could possibly be congruent and proportional." *Kazmier*, 225 F.3d at 529 (internal quotation marks omitted).

Indeed, at the time the FMLA was enacted, the data available to the Federal Government established that ninety-five percent of full-time state- and local-government employees were covered by paid sick leave plans and ninety-six percent of such employees likewise enjoyed short-term disability protection through sick leave or sick leave and sickness and accident insurance.

See Bureau of Labor Statistics, U.S. Department of Labor, *Employee Benefits in State and Local Governments*, 17-26 (1994) (surveying state and local government benefits as of 1992). Notably, a number of States provided personal medical leave benefits that functioned in ways similar to, and in several instances more generously than, the entitlement ultimately provided in the FMLA's self-care provision. For example, as Congress recognized, Connecticut had already enacted a 24-week family and medical leave law for all state employees, Maine had a similar law requiring state government to grant up to 8 weeks of unpaid personal medical leave within a two-year period, and Wisconsin required that state employees be allowed up to 2 weeks of general disability leave in a 12-month period. See H.R.REP. NO.101-28, pt. 1, at 17.[8]

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8. See also, *e.g.*, ALASKA STAT. § 39.20.305 (West 1992) (employees may take leave up to 18 weeks every 2 years to care for the illness of a child, parent, spouse, or the illness of the employee); ARK. CODE § 21-4-214 (West 1987) (providing a "catastrophic leave program" for employees who are incapacitated due to a catastrophic illness); IDAHO CODE § 67-5333(6) (West 1981) ("If an absence for illness or injury extends beyond the sick leave accrued to the credit of the officer or employee, the employee may be granted leave without pay."); LA. REV. STAT. § 42:441-444 (West 1993) (employees who have exhausted all personally accrued leave may request leave from the pool leave account for a "personal emergency" that may include a catastrophic illness or serious injury of the employee); OHIO REV. CODE § 124.385 (West 1993) (providing that a disability leave program be established for public employees, including provisions for the allowance of disability leave due to illness or injury, and provisions for approving a leave of absence for medical reasons when an employee has exhausted all other leave).

And, at the time the FMLA was enacted, California, New York, New Jersey, Rhode Island, and Hawaii provided "temporary disability insurance" ("TDI") programs to state employees. See Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 Am. U. J. Gender & L. 39, 53-54 (1994) (describing state TDI programs); see also Women's Bureau, U.S. Department of Labor, *State Maternity/Family Leave Law*, 2-18 (1993). These TDI programs, under which a small percentage of employee salaries goes into an insurance fund from which an employee is paid if he or she becomes seriously ill, allow temporarily disabled public employees to continue to receive a salary during their recovery. Lenhoff & Withers, *supra*, at 53-54.

In short, far from remedying a pattern of unconstitutional conduct among the States concerning the availability of personal medical leave, Congress was actually creating its own substantive entitlement program, modeled on preexisting state self-care leave policies.

For these reasons, and particularly given Congress's failure to identify any pattern of unconstitutional state conduct regarding discrimination against temporarily disabled workers and its related failure to identify *irrational* state conduct, Congress lacked authority

under Section 5 to abrogate state immunity in the self-care provision.[9]

C. Even Assuming the Self-Care Provision Is Designed To Address Gender-Based Discrimination, It Cannot Validly Abrogate State Immunity.

Even assuming that gender-based discrimination motivated Congress in enacting the self-care leave provision of the FMLA, it remains constitutionally invalid to the extent it purports to abrogate state sovereign immunity. The reason is simple: there is no evidence in the lengthy legislative history of the FMLA "establish[ing] any nexus between gender neutral medical leave for one's own health conditions and the prevention of discrimination on the basis of gender *on the part of the states as employers*." *Laro*, 259 F.3d at 13-14.

In this regard, Petitioner describes in some detail the nearly 8-year process leading to the enactment of

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9. Even if Congress had identified a pattern of unconstitutionally discriminatory conduct by the States against workers with serious health conditions, the across-the-board FMLA remedy of 12 weeks per year of leave for a personal illness is too broad to satisfy *City of Boerne*'s strict congruence-and-proportionality test. *Chittister* v. *Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000) ("Unlike the Equal Protection Clause, which the FMLA is said to enforce, the FMLA does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to sick leave. This requirement is disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." (citation and internal quotation marks omitted)).

the self-care provision of the FMLA. See Pet. Br. 37-51. Nonetheless, he cannot point to any evidence in the FMLA's legislative history—which includes at least 18 House and Senate reports, numerous hearings before congressional committees and subcommittees, and substantial floor debate—that shows a pattern of gender-based discrimination by any State in the provision of personal medical leave. Petitioner's inability to locate proof in the FMLA's legislative history that any State discriminated on the basis of gender concerning personal medical leave is unsurprising, as nine federal circuits have likewise been unable to discover such evidence.

Prior to the Court's decision in *Hibbs*, five circuits specifically addressing the issue had held that the enactment of the *self-care provision* of the FMLA did not abrogate the States' immunity because the congressional record lacked the necessary findings of unconstitutional conduct by the States and because the remedy imposed by the provision does not meet the "congruence and proportionality" test. See, *e.g.*, *Chittister*, 226 F.3d at 228-229 ("Notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause. . . . Moreover, even if there were relevant findings or evidence, the FMLA provisions at issue here would not be congruent or proportional."); *Hale*, 219 F.3d at 69 ("There is no evidence that this conferment of federally protected [self-care] leave is tailored to remedy sex-based employment discrimination. . . . Thus, we find that Congress did not have the authority

to abrogate the sovereign immunity of the states on claims arising under the [self-care provision] at issue here. Its attempt to do so was not congruent or proportional to the harms targeted by the Fourteenth Amendment.").[10]

And since *Hibbs* upheld the *family-care* provision of the FMLA as a valid abrogation of state immunity, seven circuits issued decisions either holding for the first time or reaffirming prior decisions that the *self-care* provision does not validly abrogate the States' sovereign immunity. See, *e.g.*, *Touvell*, 422 F.3d at 402 ("Congress adduced no evidence of a pattern of discrimination on the part of the states regarding leave for personal medical reasons sufficient to permit the abrogation of state sovereign immunity."); *Brockman* v. *Wyo. Dep't of Family Servs.*, 342 F.3d 1159, 1164-1165 (10th Cir. 2003) ("The legislative history does not, however, identify as the basis for subsection (D) a link

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10. See also *Laro*, 259 F.3d at 16 ("[T]he personal medical leave provision of the FMLA does not exhibit a sufficient congruence to the prevention of unconstitutional state discrimination to validly abrogate the states' Eleventh Amendment immunity."); *Kazmier*, 225 F.3d at 528-529 ("In sum, subsection (D) prohibits the States from engaging in such a wide array of perfectly constitutional practices that we have difficulty conjuring up *any* unconstitutional conduct by the States to which that subsection's proscriptions might possibly be proportional and congruent. . . . Without direct evidence of substantial unconstitutional discrimination by the States, there simply is no 'Fourteenth Amendment evil' to which subsection (D) could possibly be congruent and proportional." (footnotes omitted)); *Garrett*, 193 F.3d at 1219 ("[W]e hold in this case that Congress did not have the authority to abrogate the sovereign immunity of the states on claims arising under the [self-care] provision at issue here.").

[to] any pattern of discriminatory stereotyping on the part of the states as employers.").[11]

Because Congress identified no link between the self-care provision and any discriminatory practices by the States as employers, gender-based or otherwise, that provision cannot be understood as targeting unconstitutional behavior, and it likewise cannot be

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11. See also *Banks* v. *Court of Common Pleas*, 342 F. App'x 818, 821 (3d Cir. 2009) (per curiam) (unpublished) ("In [*Chittister*] we ruled that Congress did not validly abrogate the states' Eleventh Amendment immunity when it enacted provisions of the FMLA. Although the 'family-care' provisions of the FMLA were upheld by the Supreme Court in [*Hibbs*], private suits still may not be brought against states where the self-care provisions of the Act are implicated."); *Nelson* v. *Univ. of Tex. at Dallas*, 535 F.3d 318, 321 (5th Cir. 2008) ("[W]e agree with the rationale of the Sixth, Seventh, and Tenth Circuits that the Supreme Court's ruling in *Hibbs* applies only to subsection C. Therefore, this Court's decision in *Kazmier* still remains the law of this circuit with respect to subsection D."); *Batchelor* v. *S. Fla. Water Mgmt. Dist.*, 242 F. App'x 652, 653 (11th Cir. 2007) (per curiam) (unpublished) ("Our holding in *Garrett* that Congress is without authority to abrogate state sovereign immunity for claims arising under the self-care provision of the FMLA remains the law of this Circuit."); *Miles* v. *Bellfontaine Habilitation Ctr.*, 481 F.3d 1106, 1107 (8th Cir. 2007) (per curiam) ("The district court properly dismissed with prejudice Miles's FMLA claim, which was brought under FMLA's self-care provisions. As an agency of the state of Missouri, the Center is entitled to Eleventh Amendment immunity from the claim." (citations omitted)); *Toeller* v. *Wis. Dep't of Corr.*, 461 F.3d 871, 879 (7th Cir. 2006) ("We know of no reason why women would be more likely to have [a short-term] medical problem than men. Furthermore, whether we know about it is not the point in the end: what counts is that we see nothing in either the text or the legislative history of the FMLA to indicate that Congress found this to be the case.").

considered valid enforcement legislation congruent or proportional to the constitutional evil—gender discrimination—allegedly being prevented. Cf. *City of Boerne*, 521 U.S. at 520 (requiring congruence and proportionality).[12]

III. *HIBBS* DOES NOT ESTABLISH THAT THE SELF-CARE PROVISION VALIDLY ABROGATES THE STATES' IMMUNITY.

Recognizing the impossibility of establishing that the self-care provision itself meets the *City of Boerne* test, Petitioner argues that the validity of Congress's abrogation of state sovereign immunity through the self-care provision is analytically intertwined with the abrogation of immunity associated with the FMLA's three other original leave provisions. See, *e.g.*, Pet. Br. 9-10, 13. According to Petitioner, the FMLA's four original leave provisions are like a "four-legged table," and the self-care provision—a "leg" that is necessary for the table to stand—is an integral part of a unitary statutory scheme abrogating the States' immunity from suit. See *id.* If Coleman were correct, *Hibbs* would be controlling here: the Court's holding that Congress validly abrogated the States' immunity under the family-care "leg" of the table would necessarily mean

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12. Notably, the United States, well aware that the Court has granted certiorari to decide whether the self-care provision validly abrogates the States' sovereign immunity, has chosen not to participate in this case. This decision comports with the position it took in *Hibbs*, recognizing that "the difference [between the family-care and self-care provisions] matters." See Brief for the United States in Opposition at 7-8, *Hibbs*, 538 U.S. 721.

that it also validly abrogated the States' immunity under the self-care "leg."

But Petitioner is wrong. He incorrectly presumes that all of the FMLA's leave provisions address the same constitutional rights, and that proof in the congressional record of unconstitutional conduct regarding, for example, the provision of leave to care for sick family members, also establishes unconstitutional conduct regarding the provision of personal medical leave. It is clear, however, that the self-care provision addresses different constitutional rights than the family-care provision. The Court confirmed in *Hibbs* that the family-care provision addresses gender-based discrimination concerning leave to care for ill family members. 538 U.S. at 735. As demonstrated herein and in Respondents' Brief, see *supra* Part II.A; Resp. Br. 14-17, and as the circuits have overwhelmingly concluded, the self-care provision addresses concerns related to Congress's Commerce Clause power, particularly relieving economic burdens on temporarily disabled employees and their families, and concerns that such employees will suffer disability-based discrimination.

Likewise, the answer to the question whether Congress identified a history and pattern of unconstitutional state action involves independent inquiries as between the family-care and self-care provisions. Just as these two FMLA leave provisions address differing constitutional concerns, they also implicate distinct types of proof to establish a pattern of unconstitutional conduct on the part of the States. For example, evidence of a state policy that

unconstitutionally discriminated on the basis of gender regarding leave to care for an ill family member would provide no proof that the State also acted unconstitutionally regarding the provision of leave to its employees to care for personal medical conditions.

The Court recognized as much in *Hibbs*. In that case, contrary to Petitioner's theory that the FMLA's leave provisions must be analyzed as a unit regarding abrogation, the Court made clear that it would *not* address abrogation of the States' immunity under the FMLA as a whole. Rather, in addressing the question whether the family-care provision validly abrogated the States' immunity, the Court focused solely on the constitutional right protected by the family-care provision and the record of unconstitutional conduct relevant specifically to the availability of leave to care for seriously ill family members. See *Hibbs*, 538 U.S. at 729-737.[13] The Court's analysis and holding in *Hibbs*

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13. For example, the Court initially observed that "Congress found that, due to the nature of the roles of men and women in our society, the primary responsibility for *family caretaking* often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." See *Hibbs*, 538 U.S. at 729 n.2 (emphasis added) (citation and internal quotation marks omitted). The Court went on to identify a history of gender-based discrimination against women regarding leave to care for ill family members that resulted in the "denial or curtailment of women's employment opportunities [due to] the pervasive presumption that women are mothers first, and workers second." *Id.* at 736 (citation and internal quotation marks omitted). The Court ultimately concluded that, given the heightened scrutiny to which gender discrimination is subject, the family-care provision at issue in *Hibbs* is congruent and proportional to the targeted violation: *i.e.*, gender-based

that money-damages suits could proceed against States under the family-care provision was likewise premised on conclusions that it connected exclusively to family-care leave, rather than the FMLA leave provisions *in toto*. *Id.* at 737 ("By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees . . . ."); see also *Tennessee* v. *Lane*, 541 U.S. 509, 519 (2004) (noting that in *Hibbs* the Court considered whether a state employee "could recover money damages against the State for its failure to comply with the family-care leave provision of the [FMLA]").

The Court also rejected such an "all or nothing" approach to the abrogation of the States' sovereign immunity regarding the Americans With Disabilities Act ("ADA") provisions at issue in *Garrett* and *Lane*. In *Garrett*, the Court held that Title I of the ADA, which concerned employment discrimination against the disabled, was not a valid exercise of Congress's Section 5 power because it was unsupported by a relevant history and pattern of constitutional violations. 531 U.S. at 368, 374. In *Lane*, the Court upheld the abrogation of the States' immunity for claims made under Title II of the ADA related to access to the courts. 541 U.S. at 524-534.

In sum, Petitioner's "all or nothing" approach to abrogation analysis fails to appreciate that the

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discrimination by the States regarding family-care leave. *Id.* at 737.

congruence and proportionality test turns on the identification of pervasive unconstitutional conduct on the part of the States regarding the constitutional right targeted by Congress's remedial legislation.

IV. If *Hibbs* Is Controlling, It Should Be Reexamined and Overturned.

The validity of Congress's abrogation of the States' immunity in the self-care provision should be determined by applying the Court's congruence and proportionality test to the self-care provision itself, not to all of the FMLA's original leave provisions together as suggested by Petitioner. If the Court determines that Petitioner is correct, however, its decision in *Hibbs* controls the result in this case: the valid abrogation of the States' immunity as to the family-care provision must apply equally to all the FMLA's leave provisions. See *supra* Part III.

Under this circumstance, *Hibbs* should be reexamined and overturned. The Court has made clear that "'*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Citizens United* v. *FEC*, 130 S. Ct. 876, 920 (2010) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991)). Nonetheless, the Court has also confirmed that *stare decisis* is "neither an inexorable command nor a mechanical formula of adherence to the latest decision," *id.* (citations and internal quotation marks omitted), and this is especially true in constitutional cases, *id.*

Indeed, "if the precedent under consideration itself departed from the Court's jurisprudence, returning to the intrinsically sounder doctrine established in prior cases may better serve the values of *stare decisis* than would following the more recently decided case inconsistent with the decisions that came before it." *Id.* at 921 (citations and internal quotation marks omitted). Thus, "Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects." *Id.*

Hibbs departed from the Court's prior precedent concerning the abrogation of the States' immunity from suit. Although amici States agree that "women historically have been subjected to conditions in which their employment opportunities are more limited than those available to men," Congress addressed this problem by abrogating the States' sovereign immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). *Hibbs*, 538 U.S. at 745 (Kennedy, J., dissenting). *Hibbs* presented the question whether, despite Title VII and similar state laws, the States nonetheless continued to practice "widespread discrimination on the basis of gender in the provision of family leave benefits." *Id.* at 745-746. If such a pattern of unconstitutionally discriminatory conduct on the part of the States were established, Congress could create a congruent and proportional remedy and abrogate the States' immunity. *Id.* at 745.

But no such showing was made in *Hibbs*. The FMLA's findings of purpose are "devoid of any discussion of the relevant evidence" of such

discrimination, and the evidence before Congress related to the discriminatory practices of the private sector, not the States as employers. *Id.* at 746. As Justice Kennedy's dissent observed, "While the evidence of discrimination by private entities may be relevant, it does not, by itself, justify the abrogation of States' sovereign immunity." *Id.*.

The Court's conclusion that "even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways," *id.* at 732 (majority opinion), was equally flawed. This conclusion was premised on "'the parental leave policies of Federal executive branch agencies,'" not the States. *Id.* at 749 (Kennedy, J., dissenting) (quoting H.R. REP. NO. 103-8, pt. 2, at 10 (1993)). Although a pattern of discrimination by the Federal Government might support an inference that the States engaged in similar conduct, the Court failed to explain why such an inference was justified regarding the FMLA. *Id.*

Further, such an inference of unconstitutional conduct on the part of the States was particularly unwarranted because the States were actually "ahead of Congress in providing gender-neutral family leave benefits." *Id.* at 750. The congressional record confirmed that, "[t]hirty States, the District of Columbia, and Puerto Rico had adopted some form of family-care leave in the years preceding the [FMLA's] adoption." *Id.* (citing H.R. REP. NO. 103-8, pt. 1, at 32-33; S. REP. NO. 103-3, at 20-21); see also *The Family and Medical Leave Act of 1991: Hearing on H.R. 2 Before the Subcomm. on Labor-Management Relations of the H. Comm. on Education and Labor*, 102d Cong. 4

(1991) (statement of Rep. Marge Roukema) (noting that the provision of family leave was "an issue which has picked up tremendous momentum in the States, with some 21 of them having some form of family or medical leave on the books"). Tellingly, Congress also recognized that "many States had implemented leave policies more generous than those envisioned by [the FMLA]." 538 U.S. at 750 (Kennedy, J., dissenting) (citing H.R. REP. NO. 103-8, pt. 1, at 50; S. REP. NO. 103-3, at 38). Although these state policies may have been imperfect or insufficiently generous, they certainly did not provide evidence that the States were engaged in unconstitutional discrimination. See *id.* at 751-52.

Given the lack of evidence of a widespread pattern of unconstitutional conduct by the States regarding the provision of family and medical leave, Congress was not responding with a congruent and proportional remedy to a documented course of unconstitutional conduct on the part of the States. Rather, Congress enacted an entitlement program of its own, relying at least in part on the States' experience with similar entitlement programs. See, *e.g.*, S. REP. NO. 103-3, at 12-14; *The Parental and Medical Leave Act of 1987: Hearings on S. 249 Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 100th Cong., pt. 2, 194-195, 533-534 (1987). Arguably the most powerful evidence that Congress enacted an entitlement program, as opposed to a remedial one, is that the FMLA "does not even purport to bar discrimination in some leave programs the States do enact and administer." *Hibbs*, 538 U.S. at 756 (Kennedy, J., dissenting). The FMLA allows a State, for example, to provide 24 weeks of family leave to women,

but only 12 weeks to men. *Id.* Such a state law likely would not survive scrutiny under the Equal Protection Clause or Title VII, but it would not violate the FMLA. See *id.*

In *City of Boerne* and subsequent cases preceding *Hibbs*, the Court made clear that Congress may not "enforce a constitutional right by changing what the right is." *City of Boerne*, 521 U.S. at 519. The requirements established in *City of Boerne* that Congress identify a pervasive pattern of unconstitutional state conduct and that it create a remedy that is proportional and congruent to the violation, was "designed to separate permissible exercises of congressional power from instances where Congress seeks to enact a substantive entitlement under the guise of its § 5 authority." *Hibbs*, 538 U.S. at 756 (Kennedy, J., dissenting). If the Court agrees with Petitioner that the validity of Congress's abrogation of the States' immunity in the self-care provision is analytically intertwined with the FMLA's other leave provisions, and that *Hibbs* is therefore controlling here, *Hibbs* should be reexamined. And, because *Hibbs* departs substantially from the established doctrine set forth in *City of Boerne* for determining whether Congress has appropriately exercised its Section 5 authority, it should be overturned.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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